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A TREATISE
ON THE
LAW OF PARTNERSHIP,
INCLUDING ITS APPLICATION TO
COMPANIES.

Second Edition.

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CHAPTER IX.

OF PARTNERSHIP ARTICLES AND COMPANIES' REGULATIONS.

SECTION I.—GENERAL OBSERVATIONS.

THE rights and obligations of partners *inter se*, are generally, to a certain extent, regulated by special agreement, the true meaning of which is to be ascertained by the ordinary rules of construction (a).

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In considering the effect, however, of partnership articles, the following principles require to be borne in mind :—

1. In the first place, partnership articles are not intended to define, and are not construed as defining, *all* the rights and obligations of the partners *inter se*. A great deal is left to be understood. The maxim *expressum facit cessare tacitum* naturally applies to partnership articles as to other agreements ; but the rights and obligations of partners, so far as they are not expressly declared, are determined by general principles, which are always applicable where not clearly excluded. In the language of Lord Langdale, in *Smith v. Jeyes* (b), “ The transactions of partners with each other cannot be considered merely with reference to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends and continues in force ; but if the express contract, or so much of it as continues in

Partnership articles are not intended to define all the rights and duties of partners.

Smith v. Jeyes.

(a) See Chapter X. of Story on Part. ; Collyer on Part. 137, &c. See, also, the head Partnership in Jarman and Bythewood's Conveyancing, and Davidson's Conveyancing.

(b) 4 Beav. 505. See, too, *Nelson v. Bealby*, 30 Beav. 472, and *Browning v. Browning*, 31 Beav. 316, as to the non-application of the maxim *expressio unius est exclusio alterius*.

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force, does not reach to all those duties and obligations, they are implied and enforced by the law; and it is often matter to be collected and inferred from the conduct and practice of the parties, whether they have held themselves, or ought or ought not to be held, bound by the particular provisions contained in their express agreement. When it is insisted that the conduct of one partner entitles the other to a dissolution, we must consider not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract" (c).

Articles to be construed with reference to the objects of the partners.

2. The attainment of the objects which the partners have declared they had in view is always regarded as of the first importance. All the provisions of the articles are to be construed so as to advance and not to defeat those objects; and however general the language of partnership articles may be, they will be construed with reference to the end designed, and, if necessary, receive a restrictive interpretation accordingly (d). This rule is of especial importance in considering the limits of general powers conferred on committees, directors, and others. For example, in *Chapple v. Cadell* (e) the proprietors of a newspaper entrusted the management of the paper to a committee of five, and gave them power to call general meetings, and agreed that the resolutions of the majority present at such meetings should be binding on all the proprietors. A meeting was convened, and the majority present resolved that the paper and the shares of all the proprietors in it should be sold by auction. But it was held that the majority had no power to sell the shares of a dissentient and protesting minority.

Chapple v. Cadell.

Athenæum Life Insurance Society v. Pooley.

So, in the recent case of *The Official Manager of the Athenæum Life Insurance Society v. Pooley* (f), a clause in the deed of settlement of a life insurance society, declaring that the business of the society should be, amongst other things, to purchase, sell, and re-sell life, reversionary, and other personal estates and interests, was held not to authorise the purchase of Westminster Improvement Bonds. And, accordingly, some debentures of the society which had been improperly given as

(c) See, too, *Blisset v. Daniel*, 10 Ha. 522.

(d) See Coll. on Part. 137.

(e) Jac. 537.

(f) 1 Giff. 102, and 3 De G. & J. 294.

the consideration for a sale of such bonds to the society, were held not to be binding on the society, even in the hands of a purchaser for value, without notice of the circumstances under which the debentures were issued.

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Upon the same principle, general powers of management do not authorise directors to amalgamate one company with another, either by selling the assets and liabilities of their own company, or by purchasing those of another company (*g*).

Other illustrations of the same principle will be found in that part of the work which treats of the powers of majorities.

Conformably with the same rule,

3. Any provision, however worded, will, if possible, be construed so as to defeat any attempt by one partner to avail himself of it for the purpose of defrauding his co-partner. Thus it is very common for partners to agree that half-yearly accounts shall be made out and signed, and not be afterwards disputed; but, notwithstanding such a clause, if one partner knowingly makes out a false account, and his co-partners sign it upon the faith that it is correct, they will not be bound by it (*h*). Again, it is by no means unusual for partners to agree that yearly accounts shall be taken, and that, in the case of the death of a partner, his representatives shall be paid his share as appearing in the last account, with interest instead of subsequent profits; but if the partners do not for several years make out any accounts, and then one of them dies, the survivors are not entitled to act on the letter of the agreement, and pay only the amount which in the last account was carried to the credit of the deceased, with interest on such amount (*i*).

Articles to be
construed so as
to defeat fraud ;

4. Every power conferred by the articles on any individual partner, or on any number of partners, is deemed to be conferred with a view to the benefit of the whole concern; and an

and the taking of
unfair advantages.

(*g*) *Ernest v. Nicholls*, 6 Ho. Lo. Ca. 419; *Re The Era Insurance Co.*, 2 J. & H. 400; *Re The Saxon Life Assurance Society*, ib. 408, and 1 De G. J. & Sm. 29; *Gilbert v. Cooper*, 10 Jur. 580, V.-C. E.; *Beman v. Rufford*, 1 Sim. N. S. 550; *Clay v. Rufford*, 5 De G. & S. 768. Compare *Anglo-Australian Insurance*

Co. v. British Prov. Insurance Co., 3 Giff. 521, and on appeal, 8 Jur. N. S. 628, where there appears to have been power to amalgamate.

(*h*) See *Oldaker v. Lavender*, 6 Sim. 239.

(*i*) *Pettyt v. Janeson*, 6 Madd. 146.

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abuse of such power, by an exercise of it, warranted perhaps by the words conferring it, but not by the truth and honour of the articles, will not be countenanced by courts of equity. Thus, in a case which has been already frequently referred to (*j*), a power to expel any partner was vested in the holders of two-thirds of the shares in the firm; but it was held that, although this power was so framed that it might be exercised without any reason being assigned, it could not be put in force for the unfair purpose of obtaining the share of the expelled partner at less than its value.

Provisions may
be waived by
tacit agreement.

5. Any article, however express, is capable of being abandoned by the consent of *all* the partners; and this consent may be evidenced, not only by express words, but by conduct (*k*).

The maxim *modus et conventio vincunt legem* is especially applicable to cases of this description. In the language of Lord Eldon, "In ordinary partnerships nothing is more clear than this, that, although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept bills of exchange in his own name, without the concurrence of all the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, this Court will hold that they have varied the terms of the original agreement in that respect" (*l*).

Examples.

This principle was acted on by Lord Eldon in a case where the partners had agreed that annual accounts should be taken, and that in case of the death of a partner, his representatives should be paid an allowance instead of profits; for it appeared

(*j*) *Blisset v. Daniel*, 10 Ha. 493.

(*k*) This rule appears to be of comparatively modern date; it was not acted on in *Smith v. The Duke of Chandos*, Barn. 419.

(*l*) *Const v. Harris*, T. & R. 523.
See, also, *Coventry v. Barclay*, 33

Beav. 1, and on App. 3 N. R. 224;
Pilling v. Pilling, 3 De G. J. & Sm. 162; *England v. Curling*, 8 Beav. 133 and 137; *Somes v. Currie*, 1 K. & J. 605, and the cases in the next two notes.

that for some years no accounts had been taken, and that the partners had engaged in transactions of such a nature, that it would have been unfair to have applied the original agreement (*m*). So, where articles contained a stipulation that the partners should contribute to losses and share profits in a certain proportion, and it appeared that a person who managed the affairs of the firm had always received a share of the profits, but had never been called upon to contribute to losses, it was held, that assuming him to be a partner in the proper sense of the term, and to have been originally bound by the articles to contribute to losses, the articles, so far as they obliged him so to contribute, had been varied by the conduct of the parties, and were no longer binding on him (*n*).

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If it is proposed to make an alteration in the articles by an agreement which shall be binding on all parties, notice of the proposed change and of the time and place at which it is to be taken into consideration, ought to be given to all the partners (*o*). For, even if the change is one which it is competent for a majority to make against the assent of the minority, all are entitled to be heard upon the subject; and unless all have an opportunity of opposing the change, those who object to it will not be bound by the others (*p*).

Varying articles.

In large partnerships and in companies, the original articles can seldom, if ever, be varied, unless there is some power to vary them expressly conferred by the charter or statute by which the company is governed or by the articles themselves. Except where there is such a power no variation can be made by directors or by a majority of shareholders; and it is scarcely possible to obtain the consent of all the shareholders, or to bind them all by acquiescence in a particular line of conduct different from that prescribed by the articles (*q*). At the same time, if any individuals, be they shareholders or directors, choose to ignore the articles, and not to observe the provisions contained in them, those individuals

Varying company's deed of settlement.

(*m*) See *Jackson v. Sedgwick*, 1 Swanst. 460; *Pettyt v. Janeson*, 6 Madd. 146; *Simmons v. Leonard*, 3 Ha. 581.

(*n*) *Geddes v. Wallace*, 2 Bli. 270.

(*o*) See *Const v. Harris*, T. & R. 524.

(*p*) *Ib.* 525, see also *ib.* 518.

(*q*) See *Keene's Executors' case*, 3 De G. Mac. & G. 272.

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cannot afterwards object to the validity of a course of conduct adopted or acquiesced in by them on the ground that it is not warranted by the articles; but their adoption or acquiescence in no way affects the rights and obligations of the other shareholders, either *inter se* or as between them and the acquiescing parties. On this ground, the non-observance of prescribed formalities has over and over again been held to be of no consequence as between acquiescing shareholders, and yet to be fatal as between them and other non-assenting shareholders (*r*).

Effect of practice
of company.

But although it is difficult in the case of a company to obtain such consent from its shareholders as will warrant the conclusion that its original regulations are no longer to be considered binding, attention must nevertheless be paid to the practice of the company with respect to all such matters as to which it is competent for the majority to bind the minority. In deciding upon the effect of a company's act, charter, or deed of settlement, the practice of the company will be taken into account, unless it has been clearly illegal (*s*).

Reverting to
original rules.

It seems that a person who comes into a firm through another who has acquiesced in a variation of the terms of the partnership articles, is bound by that acquiescence, and cannot revert to the original articles (*t*); and this principle has been applied to companies (*u*).

Original articles
apply to partner-
ship continued
under them.

6. The last general rule which it is necessary to notice is this: if a partnership, originally entered into for a definite time, is continued after the expiration of that time, without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable to a partnership at will, to regulate the rights and obligations of the partners *inter se* (*v*). Thus, in *King v. Chuck* (*w*), three partners, A., B., C., agreed that if either of them should die, his capital,

King v. Chuck.

(*r*) Compare, for example, *Keene's Executors' case*, 3 De G. Mac. & G. 272, and *Straffon's Executors' case*, 2 De G. Mac. & G. 576.

(*s*) See *Somes v. Currie*, 1 K. & J. 605.

(*t*) See *Const v. Harris*, T. & R. 524.

(*u*) *Ffooks v. South Western Rail. Co.*, 1 Sm. & G. 142.

(*v*) See *Crawshay v. Collins*, 15 Ves. 228; *Featherstonhaugh v. Fenwick*, 17 Ves. 307; *Booth v. Parkes*, 1 Molloy, 465.

(*w*) 17 Beav. 325.

as appearing by the last account, should be paid to his representatives by the surviving partners, on whom the trade was then to devolve. A. died, and this agreement was acted on, and B. and C. continued in partnership without coming to any fresh agreement. Then B. died, and it was held that B. and C. had in fact continued in partnership on the old terms, and that B.'s executors were therefore to be paid the amount appearing to be his capital in the last account come to between him and C.

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Even where a partnership is entered into for a term of years, and the articles provide for events happening *during the term*, the above rule is still applied. Thus, where two persons agreed to become partners for fourteen years, and stipulated that if either died *during this co-partnership term*, his share should be taken by the other at a certain sum, and the fourteen years expired, and the two persons continued in partnership together without coming to any fresh agreement, and then one of them died: it was held that the above stipulation was binding, and that the share of the deceased belonged to the survivor upon payment of the sum mentioned (x). The expression, "the partnership term," seems to be equivalent to the time during which the partners continue in partnership without coming to any fresh agreement.

Provisions applicable during the term of partnership.

Clauses giving a right of pre-emption (y), and a right of expulsion (z), have been held not to apply to a partnership continued after the expiration of the time for which it was originally entered into.

SECTION II.—OF DIRECTORY AND IMPERATIVE CLAUSES.

Some clauses in partnership articles and companies' deeds of settlement are *optional*, some are *directory* only, and some are *imperative*. It is important not to confound these three different classes of clauses; and as the characteristics of each

Distinction between optional, directory, and imperative clauses.

(x) *Essex v. Essex*, 20 Beav. 442.

(z) *Clark v. Leach*, 32 Beav. 14,

(y) *Cookson v. Cookson*, 8 Sim. 529.

and 1 De G. J. & Sm. 409.

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are not apparent from the words used to denote them, it is necessary to examine and define those characteristics as accurately as possible. The chief obscurity arises from the unfortunate use of the words *directory* and *imperative*. These words are employed not only when speaking of agreements, but also when speaking of acts of Parliament; and an examination into their meaning when so used, will greatly facilitate an inquiry into their meaning when applied to less authoritative rules.

Observations on
the word im-
perative.

All laws are in one sense necessarily imperative; for if no consequences whatever result from the disobedience of a law, that law is in fact no law at all. When, therefore, laws are divided into those which are imperative and those which are directory, the division must have reference to some particular kind of consequence resulting from their non-observance (*a*). Nullity appears to be this consequence; and a law which directs a certain act to be done in a certain way, and declares that no other way shall for any purpose be equivalent to the way prescribed, is said to be imperative; whilst another law which also directs a certain act to be done in a certain way, but does not render every other way of no avail, is said to be directory only; although the consequence of not complying with its directions may be in the highest degree penal. The following may be referred to as instances illustrating this distinction:—

Examples of di-
rectory statutes,
R. v. Birming-
ham.

By the 4 Geo. 4, c. 76, § 16, it was enacted that the father, if living, of any party under twenty-one years of age, should have authority to give consent to the marriage of such party, and if the father was dead, then that other persons mentioned in the act should have such authority; and the act then went on thus: "And such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorised to give such consent." A person who was under twenty-one, and whose father was living, married without his consent. It was held that the marriage was nevertheless

(*a*) It must be remembered that persons who wilfully violate the provisions of an act of Parliament are, in strictness, guilty of a misdemeanor, [and indictable accord-

ingly, although there may be no specific penalty annexed to the violation. See *per* Lord Campbell, in *Longworth's case*, 1 De G. F. & J. 31.

valid; for the legislature evidently did not intend to bastardise the issue of marriage solemnised without the consent required (b). Bk. III. Chap. 9.
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Again, it has been held that a covenant by a municipal corporation to repay money borrowed, is valid, although the money is not borrowed for any purpose to which the borough fund is made applicable by the Municipal corporation act, and although the deed containing the covenant has not been approved by the Lords of the Treasury as required by the same act (c). And in a still more recent case it has been held, that a rate made under the Public health act of 1848 is valid, although that statute requires all rates made or collected under it, to be published in the same manner as poor-rates, and the rate in question had not been published in the manner required (d). Payne v. Brecon.

Le Feuvre v. Miller.

In each of these cases, the statute in question was said to be directory only; and to each of them the maxim *Fieri non debuit sed factum valet*, was held applicable. In each case something was to be done in a particular manner; but whatever may have been the consequences of doing it in some other manner, the invalidity of what was done was not one of those consequences; and this appears to be the test whereby to decide whether a law is directory or imperative as those terms are customarily employed (e).

A law which is directory, is a law in the true sense of the word, and imposes an obligation or duty; and in this respect it differs from the expression of a desire, which those to whom it is addressed may lawfully comply with or not at their pleasure. In other words, compliance with a law which is directory is not optional. Observations on
the word direc-
tory.

Passing now to partnership articles and companies' regulations and deeds of settlement, it will be found that the words directory and imperative are not always employed, when speaking of them, in the strict sense above explained. There is a tendency to overlook the difference between an optional and a Directory and
imperative as ap-
plied to partner-
ship articles, &c.

(b) *R. v. Birmingham*, 8 B. & C. 29. rectory statutory enactments, see
Hunt v. Hibbs, 5 H. & N. 123;

(c) *Payne v. Brecon*, 3 H. & N. 572. *Brumfitt v. Bremner*, 9 C. B. N. S. 1;

(d) *Le Feuvre v. Miller*, 8 E. & B. 321. *R. v. Rochester*, 7 E. & B. 910;
Lancaster, &c., Rail. Co. v. Heaton,
8 E. & B. 952.

(e) For other instances of di-

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directory clause, and to use the word imperative in the sense of binding on the majority; and this tendency has led to no little confusion. If a clause is directory, in the sense of not rendering invalid that which is done otherwise than in the mode it prescribes; and if, as frequently happens, those who do not observe its directions are in no worse position than those who do, it is clear that the clause is one, the observance of which is practically optional. To call such a clause directory leads to nothing but confusion. A clause is optional, not directory, if no consequence results from its non-observance.

A clause may be optional, although the presumption against its being so is strong; for when shareholders sign deeds containing clauses directing those entrusted with the management of their affairs to do certain things in a certain way, the inference is that those clauses were not inserted for nothing, and that the directions contained in them were intended to be obeyed. If, however, a clause is optional, it is not directory in the sense above explained. On the other hand, a clause which is not optional may be directory, or it may be imperative: but no clause can be either, if its observance or non-observance is a matter of perfect indifference; or in other words, if the legal consequences of observance and non-observance are precisely the same.

Clauses non-observance of which is of no consequence.

Again, the word directory is occasionally employed to denote clauses the non-observance of which is said to be of no consequence under certain circumstances. If, under the circumstances supposed, observance or non-observance is a matter of no consequence whatever, the term directory is evidently used in the sense of optional; but, if by no consequence is meant of no such consequence as that contended for (there being some other consequence), then the term directory is not misapplied.

Misuse of the term imperative.

The distinction between directory and imperative clauses turns, neither on the right to repeal them, nor on the right of infringing them, but on the consequence of infringing them whilst they are in force; and whilst the consequence of infringing an imperative clause or regulation is the nullity of what is done, the consequence of infringing a directory clause or regulation is not nullity, but something different.

It follows, from the foregoing observations, that the power of a majority to alter, suspend, or repeal any clause in a company's deed of settlement, or any regulation established for the conduct of the company's affairs, does not, properly speaking, depend upon whether the clause or regulation whilst in force is directory or imperative; but upon whether it is, as regards the majority, optional or not. This turns, as has been already seen (*f*), on the question whether the clause is *fundamental* or *subsidiary*, *i. e.*, upon whether it can or cannot be repealed or departed from consistently with the objects for, and terms on, which the company was formed. The division of clauses into *fundamental* and *subsidiary*, and into *imperative* and *directory*, are cross divisions, and are based on different principles.

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Clauses optional
with the ma-
jority.

The division into fundamental and subsidiary has reference to the power to repeal or alter; whilst the division into imperative and directory has reference to the consequence of non-observance whilst in force. The last division, moreover, applies as well to fundamental as to subsidiary clauses. A fundamental clause, however, cannot be optional. The cross divisions may be represented thus:—

1.	{	<i>fundamental</i> . . .	{	<i>imperative.</i>
				<i>directory.</i>
	{	<i>subsidiary</i> . . .	{	<i>optional.</i>
				<i>imperative.</i>
				<i>directory.</i>
2.	{	<i>optional.</i>	{	<i>imperative</i> . . .
				<i>directory</i> . . .
	{	<i>non-optional</i> . . .	{	<i>fundamental.</i>
				<i>subsidiary.</i>
				<i>fundamental.</i>
				<i>subsidiary.</i>

What the precise consequence of not observing a directory clause may be, depends in each case upon the act, charter, deed of settlement or regulations of the company. If no particular consequence can be pointed out, that very circumstance might be supposed to confer upon the minority a right to judicial assistance for the purpose of having the affairs of the company properly carried on. For although a majority cannot be controlled in the exercise of powers which legitimately belong to them, they may properly be prevented from exer-

Consequences of
not observing
directory clauses.

(*f*) *Ante*, p. 601, *et seq.*

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cising powers which do not belong to them; and interference for the purpose of preventing them from infringing a non-optional but directory clause or regulation, is clearly warranted by this principle. Indeed, such interference would appear to be the more called for, as without it a confessedly non-optional clause becomes, in the case supposed, a mere dead letter. This, however, is not exactly the view taken by courts of equity. In determining whether they will or will not interfere with the management of the affairs of the company, courts of equity regard not so much the question whether what is being done is contrary to an imperative or directory clause, but whether it is contrary to a fundamental or subsidiary clause. If a subsidiary clause only is being infringed, the Court will not interfere, except to protect a majority against a minority; whilst if a fundamental clause is being infringed, the Court will interfere to protect a minority against a majority (*g*).

Having pointed out what the writer conceives to be the true meaning of the word directory, as distinguished from imperative on the one hand and optional on the other, it is proposed to notice a few cases in which clauses certainly not intended to be optional with the directors have been held to be subsidiary, and not fundamental, and to be directory, and not imperative, although the consequences of disregarding those clauses are by no means apparent.

Examples of so-called directory clauses.

Holding of meetings.

In *Foss v. Harbottle* (*h*), an act of Parliament incorporating the Victoria Park Company, declared that it should be in the power of a certain number of shareholders, acting in a certain manner, and observing certain forms, to require the directors to convene extraordinary meetings, and in case of their default, to convene such meetings themselves. A question having arisen how far it was necessary to adhere strictly to the letter of the enactment, in order to give validity to the acts of a meeting convened under it, the Vice-Chancellor, Sir James Wigram, expressed a strong opinion that the acts of a meeting convened in substantial compliance with the statute would be valid, although all the prescribed forms had not been observed. He considered the statute to be in this respect directory only.

(*g*) This subject will be examined hereafter. See bk. iii. ch. 10, § 3.

(*h*) 2 Ha. 461.

In *The Thames Haven and Dock Railway Company v. Rose* (i), a private act of Parliament directed that the business of a company should be carried on by twelve directors, of whom five should be a quorum; and the Court of Common Pleas was of opinion that the act was in this respect directory only, and that calls made by five out of seven directors, there being no more, were valid (j).

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Quorum of
directors.

Again, it has more than once been held, that when a company is incorporated by charter, or act of Parliament, which directs the observance of certain forms before the corporate seal is annexed to contracts purporting to bind the body corporate, a contract under the corporate seal, and of a kind authorised by the charter or statute, is binding on the corporation, although the seal may have been annexed without the observance of the prescribed formalities (k).

Cases where a
document has
been informally
sealed.

So, in the case of an ordinary joint-stock company, the deed of settlement of which declared that all cheques on its bankers were to be signed by three directors, and the directors drew cheques signed by less than three of them, it was held that this irregularity did not affect the right of the directors to be allowed as between themselves and the shareholders the sums drawn out, such sums having been *bonâ fide* applied for the purposes of the company (l).

Signature of
cheques.

So, clauses relating to the mode of signing minutes of meetings, keeping registers, and making returns, so as to render them admissible in evidence without preliminary proof, are considered as directory only (m).

Signature of
minutes.

These cases are not to be confounded with those in which both courts of law and courts of equity have held shareholders and companies estopped from taking advantage of the non-observance of formalities. Such cases do not turn upon whether the clauses prescribing the formalities are directory or

Cases of estoppel
to be distin-
guished.

(i) 4 Man. & Gr. 552.

(j) Compare *Kirk v. Bell*, 16 Q. B. 290, and other cases cited, *ante*, p. 250.

(k) See *The Royal British Bank v. Turquand*, 6 E. & B. 327, and 5 E. & B. 248; *Agar v. The Atheneum Life Assurance Society*, 3 C.

B. N. S. 725; *D'Arcy v. Tamar, &c., Rail. Co.*, 1 W. N. 236, Ex.

(l) *Ex parte Bignold*, 22 Beav. 143.

(m) See as to minutes of meetings, *ante*, p. 565, and as to registers and returns, *ante*, p. 143.

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imperative; but upon the very different question, whether, supposing them to be imperative, the invalidity of what has been done informally can be insisted on by those who have always treated it as valid, and induced others to do the same (n).

SECTION III.—ON THE USUAL CLAUSES IN ARTICLES OF PARTNERSHIP.

Usual clauses
in partnership
articles.

Having now alluded to certain general rules which require to be borne in mind in considering the effect of special agreements between partners, it is proposed to notice shortly the provisions usually met with in partnership articles, and the interpretation which has been put upon them by the courts.

In framing articles of partnership, it should always be remembered, that they are intended for the guidance of persons who are not lawyers; and that it is therefore unwise to insert only such provisions as are necessary to exclude the application of rules which apply where nothing to the contrary is said. The articles should be so drawn as to be a code of directions, to which the partners may refer as a guide in all their transactions, and upon which they may settle among themselves differences which may arise, without having recourse to the Court of Chancery.

1. Nature of
business.

1. *The nature of the business.*—This should always be stated. Upon it depends the extent to which each partner is to be regarded as the implied agent of the firm in his dealings with strangers; and upon it also in a great measure depends the power of a majority of partners to act in opposition to the wishes of the minority (o).

2. Commence-
ment of the
partnership.

2. *The time of the commencement of a partnership.*—*Primâ facie*, articles of partnership, like other instruments, take effect from their date; and if they are executed on the day of their date, and contain no expression indicating when the partnership is to begin, it must be taken to commence on the day of the date of the articles, and parol evidence to show that this was not intended is not admissible (p).

(n) See *ante*, p. 132, *et seq.*

(o) See *ante*, p. 602, *et seq.*

(p) *Williams v. Jones*, 5 B. & C. 108. If the articles are not dated,

It occasionally happens that it is expressly declared by the partnership articles that the partnership is to date from a specified time, either prior or subsequent to the day on which the articles are executed. The effects of such a declaration, as between the parties to the articles, and as between them on the one hand, and third persons on the other, are by no means the same. As between the parties themselves the time specified is that from which the accounts of profits and losses are to date; but as between those parties and third persons the time in question is of little if any importance; for an agreement that a partnership shall date from a time past does not enure to the benefit of creditors (*q*), and an agreement that it shall date from a time future does not prejudice them, if, in fact, the parties act as partners before such time arrives (*r*).

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Retrospective
and prospective
partnership.

It occasionally happens that an agreement for a partnership is drawn up and signed, but a more formal instrument is intended to be executed. If in a case of this sort the execution of the formal instrument is delayed, the commencement of the partnership is not necessarily delayed also. Whether it is or is not must depend on the terms of the preliminary agreement; for by that agreement the parties are bound, and its terms will regulate their rights and obligations *inter se*, so long as the more formal instrument is unexecuted (*s*).

Formal contract
to be drawn up.

3. *The name or style of the firm*, should be expressed; and it should be declared that no partner shall enter into any engagements on behalf of the firm except in its name. Such an agreement is capable of being enforced in equity (*t*); and it may be of use in determining, as between the partners, whether a given transaction is to be regarded as a partnership transaction or not.

3. The style of
the firm.

4. *The duration of the partnership*.—If the time for which the partnership is to endure is not limited to a definite period, either expressly or by necessary implication, the partnership

4. The duration
of the partner-
ship.

parol evidence is admissible to show that they were not to take effect from the time of their execution. See *Davis v. Jones*, 17 C. B. 625.

(*r*) *Battley v. Lewis*, 1 Man. & Gr. 155.

(*s*) See *England v. Curling*, 9 Beav. 133.

(*q*) *Vere v. Ashby*, 10 B. & C. 288.

(*t*) See *Marshall v. Colman*, 2 J. & W. 268.

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will be dissolvable at the will of any partner (*u*). But it must not be forgotten that a partnership entered into for a definite time is dissolved by the death or bankruptcy of any one of its members before that time has expired (*x*), and that it is therefore necessary to provide for these events in order to give effect to the agreement as to time.

A partnership entered into for a certain time, and continued after that time has expired, is a partnership at will (*y*).

5. The premium.

5. *The premium*.—The points to be attended to with reference to this, are, 1, when, to whom, and how it is to be paid, and, 2, whether the whole or any part of it is to be returned in any and what events. The law relating to this subject has been already noticed (*z*).

6. The capital
and property of
the firm.

6. *The capital and property of the firm*.—The articles should always carefully specify what is and what is not to be considered as partnership property; particularly where one partner is, or is to be, solely entitled to what is to be used for the common purposes of all. If one partner is entitled to land which is to become partnership property, it is usual (in order to prevent a sale to a person for value without notice), to have that land conveyed or assigned to trustees for the firm; but, as between the partners themselves, all that is requisite is to declare in the articles that the land shall form part of the assets of the firm. It is also prudent to declare that, as between the real and personal representatives of any deceased partner, his share shall be deemed personal estate. It should be declared that apprentice fees and other casual payments belong to the firm, and form part of its profits.

Official appointments.

A kind of property which is difficult to deal with, and which should always be made the subject of an express agreement, is the benefit accruing from an office or appointment obtained by one of the partners. For example, in the case of a firm of solicitors, one of them may be a clerk to some turnpike trust, or to a poor law board, or he may hold some other appointment yielding a salary. Care should always be taken to specify whether the salary is to belong solely to the partner

(*u*) *Ante*, 223, 226.

17 Ves. 307, and *ante*, p. 224.

(*x*) *Ante*, 235, 236.

(*z*) *Ante*, p. 75, *et seq.*

(*y*) *Featherstonhaugh v. Fenwick*,

holding the appointment, or whether it is to form part of the partnership assets (*a*); and if the latter, provision should be made for the payment of a sum by the partner holding the appointment in the event of the dissolution of the firm, whilst the appointment continues. If the profits of the office are partnership assets, and the firm is dissolved whilst the office is held by one of its members, the Court, in winding up the partnership, will leave him in the enjoyment of the office, but charge him with its value in his account with the firm (*b*).

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When a partnership is formed for working some secret and unpatented invention, the articles should specify to whom exclusively the right of working such invention shall belong in the event of dissolution. For if there be no agreement on the subject, all the parties will have a right to work it, in opposition to each other, there being no ground upon which any of them can be prevented from so doing. If, however, it can be proved by the inventor that his secret was to be kept from his co-partners, or that they, if they discovered it, were not to make use of their discovery, they will not be allowed to violate the agreement into which they have entered, or the trust reposed in them; and the circumstance that the invention has not been patented will not be material (*c*).

Trade secrets,
patents, &c.

Good-will is a kind of property which ought also to be expressly provided for; but this is most conveniently done in connection with the dissolution clauses (*d*).

Good-will.

The proportions in which the capital is to be contributed by the partners, and the proportions in which they are to be entitled to it when contributed, ought also to be carefully expressed. It by no means follows that the partners are to be entitled to the assets in the proportions in which they contribute to the capital. Indeed, if no express declaration upon the subject is made, the *primâ facie* inference is, that all the partners are entitled to share the assets (minus the capital)

Contributions
of capital.

(*a*) See *Collins v. Jackson*, 31 Beav. 645, noticed *ante*, p. 652, where profits arising from appointments of this sort were held to belong to the partnership, although *primâ facie* they do not.

(*b*) See *Smith v. Mules*, 9 Ha. 556.

(*c*) See *Morison v. Moat*, 9 Ha. 241.

(*d*) See, as to this, *infra*, p. 842.

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Capital should
be money.

Rules as to con-
ditions prece-
dent.

equally, although they may have contributed to the capital unequally (e).

The capital should be expressed to be so much money; and if one of the partners is to contribute lands or goods instead of money, such lands or goods should have a value set upon them, and their value in money should be considered as his contribution. If this be not done, the articles and accounts and the proportions in which profits and losses are to be shared will be less perspicuous and free from doubt than would otherwise be the case; and the partner who contributes land will generally be inclined to look upon such land as his, and not as part of the common stock.

When the articles provide that each partner shall bring in so much capital, or do some other specified thing, the question sometimes arises how far the fulfilment by each of his obligations is a condition precedent to his right to call for fulfilment by the others of their obligations. The rules laid down in the well-known note to *Pordage v. Cole* (f), must be applied to all such cases. These rules are as follows:—

“ 1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or *may* happen, *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act.

“ 2. When a day is appointed for the payment of money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance.

“ 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action

(e) *Ante*, p. 675 and p. 790.

(f) 1 Wms. Saund. 320, a.

may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. Bk. III. Chap. 9.
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“ 4. But where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions, and the performance must be averred.

“ 5. Where two acts are to be done at *the same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the *same day*, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale.”

In conformity with these rules, it was held, in *Stavers v. Curling* (g), that the plaintiff who had covenanted to proceed on a whaling voyage, and to obey the instructions of the defendants, but who had not obeyed them, could nevertheless maintain an action against them for the share of the profits which they had covenanted to pay him, although they had only covenanted to pay him on the performance by him of his covenants. Stavers v.
Curling.

So in *Kemble v. Mills* (h), where two persons had agreed to become partners, and one of them was to bring in 2000*l.*, and do certain things, and the other was to bring in 5000*l.*, it was held that an action lay for non-payment of the 5000*l.*, although the plaintiff did not state that he had brought in his 2000*l.*, or had done any other of the acts which he had agreed to do. Kemble v. Mills.

Capital is sometimes agreed to be brought in in the shape of good debts. Where, on the formation of a partnership, it was agreed that one of the partners should bring in 40,000*l.* of good debts, and that sum was owing to him by persons who continued customers of the firm after its formation, and became indebted to it, and who in time paid it 40,000*l.* and more, it was held that this sum had been brought in as agreed. For nothing having been said as to the accounts on which the Bringing in so
much in good
debts.

(g) 3 Bing. N. C. 355.

Compare *Marsden v. Moore*, 4 H. &

(h) *Kemble v. Mills*, 9 Dowl. 446. N. 500.

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payments were made, and each customer's account having been kept in such a way as to form one single continuous account, the 40,000*l.* was treated as having been paid in discharge of the earliest items in their respective accounts; or, in other words, in discharge of the debts owing to the partner who undertook to bring in that amount of good debts, and not in discharge of the subsequent debts contracted with the firm (*i*).

In a recent case, a father, who was in business, took his sons into partnership, and agreed to bring into the business all the capital, plant, and stock in trade then and usually employed by him in the business. In estimating the capital, the book debts due to the father were valued at twenty per cent. below their nominal amount, but they, in fact, realized more; and it was held that the surplus constituted part of the father's capital, and not part of the profits of the partnership (*k*).

Guarantee
against debts.

When a person is about to enter a firm, he sometimes requires a guarantee that its debts do not exceed a certain sum. If such a guarantee is given, and it turns out that the debts of the firm exceeded the sum mentioned at the time in question, the guarantor is liable to an action; and the amount of damages which the plaintiff is entitled to recover is the loss he has sustained in consequence of the excess of debts above the sum mentioned; but not the loss he may have suffered by having joined the firm (*l*).

7. Interest, allowances, &c.

7. *Interest allowances, &c.*—The allowance of interest on capital and on advances should be made the subject of special agreement. The interest should be made payable before the profits to be divided are ascertained, and the interest on advances should be made payable before interest on capital (*m*).

Monies to be
drawn out.

Most articles of partnership contain a clause authorising each partner to draw out of the partnership funds a certain

(*i*) *Toulmin v. Copland*, 2 Cl. & Fin. 681; S. C., 3 Y. & C. Ex. 636.

(*k*) *Cooke v. Benbow*, 3 De G. J. & Sm. 1.

(*l*) *Walker v. Broadhurst*, 8 Ex. 889.

(*m*) See, as to interest, when there is no agreement to allow it, *ante*, p. 771.

sum per month for his own private purposes. Such a clause should provide for the repayment with interest of whatever may be drawn out in excess of the sum mentioned.

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The articles should also specify what expenses are to be borne by the firm; and particular notice should be taken of allowances of an unusual kind, but which the partners may intend shall be made, *e.g.*, an allowance for treating customers, for management, for rent, maintenance of servants, &c., &c. (n).

Expenses to be
charged to the
firm.

8. *Conduct and powers of the partners.*—It is the practice to insert in partnership articles an express covenant by each partner to be true and just in all his dealings with the others. This, however, is always implied; and the clause in question is of little use in a legal point of view, although it may serve to remind the partners of their mutual obligations to good faith. In a recent case, two partners covenanted that they respectively would be true and just to each other in all their contracts, reckonings, receipts, payments, and dealings; and each bound himself to the other in the penal sum of 5000*l.* for the due performance of the covenants in the articles. One of the partners became greatly indebted to the firm in respect of receipts by him on its account. It was contended that the debt was a specialty debt by reason of the covenant above referred to; but it was held that the debt was only a specialty debt to the extent of 5000*l.*, the amount of the penalty in which each partner was bound to the other, and that the residue of the debt was a simple contract debt only (o).

8. Conduct and
powers of part-
ners.

It is useful to state who is to have the power of hiring and dismissing servants (p).

Hiring servants,
&c.

The time and attention which the partners are to give to the affairs of the firm should be expressly mentioned; especially if one of them is to be at liberty to give less of his time and attention than the others.

Amount of atten-
tion to be given
to affairs of the
firm.

It is usual to insert in partnership articles a clause prohibiting any partner from doing certain things without previously obtaining the consent of the others; *e.g.*, becoming surety, releasing debts, speculating in the funds, drawing, accepting,

Stipulations that
one partner shall
not do certain
things without
the consent of
the others.

(n) *Ante*, p. 763.

305.

(o) *Powdrell v. Jones*, 2 Sm. & G.

(p) See *ante*, p. 602.

Bk. III. Chap. 9. or indorsing bills, otherwise than in the usual course of business, &c., &c.
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Majority.

If the number of partners exceeds two, the majority should be expressly entrusted with the power of deciding what shall be done as regards any matter in dispute between the partners, and relating to the business of the partnership, as defined by the articles (*q*). It is difficult to lay down a general rule for the determination of what is to be done if the partners are equally divided. Articles of partnership, as usually drawn, are silent upon this question; but if it were declared that in such a case matters should be left in *statu quo*, probably some little assistance would be given to the preservation of peace and good will.

9. Custody of the partnership books.

9. *Partnership books*.—In order to prevent any disputes as to the custody of the partnership books, it is advisable to declare that they shall be kept at the office of the partnership, and that each partner shall have free access to them. A court of equity will restrain the removal or detention of the partnership books contrary to an express agreement entered into by the partners (*r*); and even in the absence of any special agreement, the Court would probably interfere, for it is an implied obligation on the part of every partner not to exclude his co-partners from access to the books of the firm (*s*).

10. Accounts to be kept and taken.

10. *Accounts*.—The object of taking partnership accounts is two-fold, viz., 1. To show how the firm stands as regards strangers; and 2. To show how each partner stands towards the firm. The accounts, therefore, which the articles should require to be taken, should be such as will accomplish this two-fold object. The articles should consequently provide, not only for the keeping of proper books of account, and for the due entry therein of all receipts and payments, but also for the making up yearly of a general account, showing the then assets and liabilities of the firm, and what

(*q*) See, as to the powers of a majority, *ante*, p. 601, *et seq.*, and *Falkland v. Cheney*, 5 Bro. P. C. 476, which turned on the wording of the articles.

(*r*) See *Taylor v. Davis*, 3 Beav. 388, *note*; *Greatrex v. Greatrex*, 1

De G. & Sm. 692.

(*s*) In *Greatrex v. Greatrex*, 1 De G. & Sm. 692, it does not appear whether any express agreement as to the custody of the books had been entered into or not.

is due to each partner in respect of his capital and share of profits, or what is due from him to the firm, as the case may be. Bk. III. Chap. 9.
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In order, moreover, to prevent accounts which have been once fairly taken and settled from being afterwards disputed, the articles usually declare that an account when signed shall be treated as conclusive. A provision to this effect is extremely useful, and should never be omitted; but however stringently it may be drawn, no account will be binding on any partner who may have been induced to sign it by false and fraudulent representations, or in ignorance of material circumstances dishonourably concealed from him by his co-partners (*t*). Accounts agreed
to not to be re-
opened.

Moreover, an account may be conclusive for one purpose, although not for another, *e.g.*, for the purpose of calculating the profits to be divided so long as the firm is unchanged, but not for calculating the total amount to be paid to a partner on his expulsion from the firm (*u*). Accounts conclu-
sive for one pur-
pose but not for
another.

So, from the fact that nothing is reckoned for good-will in taking annual accounts with a view to a division of profits, it does not follow that the good-will is not to be reckoned on a dissolution of the partnership by the death or retirement of a partner (*x*). Nor does it follow that because profits and losses are annually divided equally, the losses on a final winding up are to be divided equally, without reference to the capitals of the partners (*y*).

The most important and instructive case on this subject is *Coventry v. Barclay* (*z*). There it was provided that accounts should be taken and signed yearly, and not be afterwards disputed, and that on the death of a partner the survivors should be at liberty to take his share at its value, according to the last annual account preceding his death. The partners were accustomed in their annual accounts to put a nominal value on their plant and stock in trade, and to carry over a portion of *Coventry v.*
Barclay.

(*t*) See *Oldaker v. Lavender*, 6 Sim. 239; *Blisset v. Daniel*, 10 Ha. 493.

(*u*) *Blisset v. Daniel*, 10 Ha. 493. Compare *Coventry v. Barclay*, *infra*, note (*z*).

(*x*) *Wade v. Jenkins*, 2 Giff. 509.

(*y*) *Wood v. Scoles*, L. R. 1, Ch. App. 369.

(*z*) 33 Beav. 1, and on appeal, 3 N. R. 224.

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their profits to a separate account, in order to form a reserve fund to answer unforeseen losses. Shortly before the death of one of the partners, the others *bonâ fide* made up an annual account in the usual way, and sent him a copy of it, which he never signed, but never in any way disapproved. It was held (both by Lord Romilly and Lord Westbury) that the executors of the deceased partner were bound by the nominal valuation of the stock, &c., but (by Lord Westbury, reversing the decision below) that they were entitled to a share of the surplus of the reserve fund after paying the losses, &c., to meet which it was created.

Accounts not
signed.

The accounts having, in this case, been taken *bonâ fide* and in the usual way, and no errors being suggested, the absence of the deceased partner's signature was treated as of no importance, for he could not properly have refused to sign them.

11. Retiring
from the firm.

11. *Retiring*.—In the absence of a special provision enabling a partner to retire, there is no method by which he can do so without a general dissolution and winding up of the firm; unless, of course, some agreement can be made between all the partners at the time of retirement. Moreover, as has been seen already, a partnership which has been entered into for a definite time, cannot be dissolved at the will of any member. It is obviously, therefore, in many cases necessary to insert in the articles a special clause enabling a partner to retire, and defining the terms on which, as between himself and co-partners, he is to be at liberty so to do.

Power to sell
share.

If it is provided that a partner may sell his share, and no restrictions are mentioned, he may sell to any one he likes, even to a pauper; and on giving his co-partners notice of his withdrawal from the firm, he will cease to be a member thereof as between himself and them; even although the purchaser from him does not come forward and take his place as a partner in the firm (a).

Co-partners to
have refusal of
share.

It is sometimes declared that a partner who is desirous of retiring shall offer his share to his co-partners before selling it to any one else.

In *Homfray v. Fothergill* (b), the articles provided that the

(a) See *Jefferys v. Smith*, 3 Russ. 158, *ante*, p. 699. (b) L. R. 1, Eq. 567.

offer should be made first to the other partners collectively; and if they should decline, then to those desirous of collectively purchasing; and if none such, then to the partners individually. It was held that an offer by one partner to all the others was equivalent to an offer to all of them, and also to such of them as might be desirous of buying, and that one of them having declined to buy, the others were at liberty to do so, although no fresh offer to sell to them had been made, and the retiring partner refused to make such offer.

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In *Glassington v. Thwaites* (c), the articles provided that no share should be disposed of by any partner until one month after notice in writing under his hand had been given to the other proprietors at a monthly meeting. A partner desirous of selling his share, wrote a notice to that effect in a book which was produced at monthly meetings, and which all the partners had at all times power to inspect. It was held that the notice so given was sufficient, even although the book was not seen by all the partners. As a general rule, however, notice should be given to each partner individually (d).

How notice may
be given.

In a recent case, two persons became partners, and agreed that in the case of the death of either, the other should buy his share, or if he declined so to do, then that the share of the deceased should be sold to any person who might choose to buy it. One of the partners died, and the survivor declined to buy his share, or to enter into partnership with any purchaser of it. Under these circumstances, the Court, at the suit of the executor of the deceased partner, decreed a sale of his share, and directed that, if no *bonâ fide* sale could be effected, an account should be taken in order to ascertain the value of such share. No sale being effected, and the accounts having been taken, the surviving partner was decreed to pay the amount of the share of the deceased and the costs of the suit (e).

Sale if offer is
declined.
*Featherston-
haugh v. Turner.*

Articles of partnership frequently contain a clause to the effect, that in case a partner is desirous of retiring, he shall give so many months' notice to his co-partner, who shall have the option of purchasing the share of the retiring part-

Declaring option
to purchase.

(c) Coop. temp. Brougham, 115.

(d) Ib.

(e) *Featherstonhaugh v. Turner*,
25 Beav. 382.

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ner. If such a clause is acted on, and a partner notifies his desire to retire to his co-partner, and the latter declares his option to purchase the share of the retiring partner, a contract is thereby concluded between them, from which neither can depart without the consent of the other (*f*). Consequently, the retiring partner cannot withdraw his notice and dissolve the partnership under some other clause in the deed (*f*). Even if the co-partner who is to purchase the other out infringes the partnership articles, the Court will not willingly interfere and dissolve the partnership; although if the partner who is to retire conducts himself so as to prejudice the business and exclude the other, the Court will interpose for the protection of the latter; for otherwise the business to which he is shortly to be solely entitled may be entirely ruined (*g*).

Enlarging time
for purchasing.

With respect to the exercise of a right of pre-emption, it must be borne in mind that if the right is to be exercised within a given time it cannot be exercised afterwards, unless the time has been enlarged by the parties themselves. Courts of equity will not extend the time on the ground that it was accidentally allowed to slip by (*h*).

In a recent case an offer to sell was made to a person who became lunatic after it was made, but before the time for accepting it had expired; it was held that his committee was not entitled to an extension of such time, nor to a renewal of the offer (*i*).

12. Dissolving
the firm.

12. *Dissolving the firm*.—Where the articles expressly stipulate that it shall be lawful for either partner to dissolve the partnership upon the commission by the other of certain specifically forbidden acts, the partnership may of course be determined if either partner does these acts. But this clause, like any other, may be waived by mutual consent; and even if not waived, advantage cannot be taken of it to dissolve the part-

(*f*) See *Warder v. Stilwell*, 3 Jur. N. S. 9, V.-C. Stuart; *Homfray v. Fothergill*, ante, p. 825, note (*b*).

(*g*) See *Warder v. Stilwell*, 3 Jur. N. S. 9, V.-C. Stuart.

(*h*) See on this subject, *Brooke v.*

Garrod, 2 De G. & J. 62; *Lord Ranelagh v. Melton*, 2 Dr. & Sm. 278.

(*i*) *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302.

nership on the ground of the commission of any forbidden act, after the lapse of any considerable time since such act came to the knowledge of the partner seeking to avail himself of it (*k*). Bk. III. Chap. 9.
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It is not unusual to provide for a dissolution or retirement in case a partner shall become insolvent. The word *insolvent*, unless controlled by context, means unable to pay debts, in the ordinary acceptation of that phrase. A person may therefore be insolvent, although his assets, if all turned into money, might enable him to pay his debts in full (*l*); and although he has not been adjudicated bankrupt or compounded with his creditors (*m*). But a person is not deemed insolvent merely because he keeps renewing a bill which he cannot conveniently meet (*n*). In case of insolvency.

A clause enabling any partner to determine the partnership by giving notice to the others, may be acted on, although one of the firm has become insane; for the partner serving the notice is not bound to find understanding for him who is served (*o*). Giving notice where one partner is insane.

A notice to dissolve on a given day of the week, and a given day of the month, is bad if there is any mistake in either date; *e. g.*, a notice to dissolve on Monday the 9th is bad, if the 9th falls on a Friday (*p*). Informal notice.

In a case where it was provided that the dissolution should be by deed, it was held that a submission by deed of all matters in dispute between the partners, and an award under seal made upon that submission dissolving the partnership, had the effect Dissolution to be by deed.

(*k*) See *Anderson v. Anderson*, 25 Beav. 190, which must not be considered as an authority for the doctrine that the Court will not hold partners to their articles. The notice to dissolve in that case was given six months after the commission of the act complained of, and not on account of such act, but in consequence of other disputes.

(*l*) See *per Le Blanc, J.*, in *Bayly v. Schofield*, 1 M. & S. 338.

(*m*) See *Parker v. Gossage*, 2 C.

M. & R. 617, and *Biddlecombe v. Bond*, 4 A. & E. 332, in which it was held that "insolvent" had not the technical meaning of having taken the benefit of the acts for the relief of insolvent debtors.

(*n*) *Cutten v. Sanger*, 2 Y. & J. 459; and see *Anon.*, 1 Camp. 492.

(*o*) *Robertson v. Lockie*, 15 Sim. 285.

(*p*) *Watson v. Eales*, 23 Beav. 294.

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Signing notices
of dissolution.

13. Powers of
expulsion.

Blisset v. Daniel.

of dissolving it, although nothing was said about dissolution in the submission (q).

When power is given to retire or dissolve the firm, or to expel a partner from it, power should also be given to any partner to sign, in the name of himself and co-partners, a notice of dissolution for insertion in the "Gazette" (r).

13. *Expelling*.—In order that an objectionable partner may be summarily got rid of, clauses are sometimes inserted providing for expulsion in certain events. All such clauses are construed strictly, on account of the abuse which may be made of them, and of the hardship of expulsion; and a court of equity will never allow a partner to be expelled if he can show that his co-partners, though justified by the wording of the expulsion clause, have, in fact, taken advantage of it for base and unworthy purposes of their own, and contrary to that truth and honour which every partner has a right to demand at the hands of his co-partners. In *Blisset v. Daniel* (s), the expulsion clause was as follows: "That it shall be lawful for the holders of two-thirds or more of the shares for the time being, from time to time to expel any partner, by giving to, or leaving for him, at his then last place of abode in England or Wales, a notice in writing under their hands of such expulsion, which, in such event, shall operate from and at the time of giving or leaving such notice, and shall be in the following form, namely, 'We do hereby give you notice that you are hereby expelled from the partnership carried on under the firm of *John Freeman and Copper Company*. Witness our hands this — day of —.' " The power, therefore, was in the most general terms; no reasons for its exercise were required to be given, no meetings or deliberations were declared to be necessary, before serving the notice. The holders of two-thirds of the shares signed a notice in the form prescribed, and served it on the partner whom they desired to expel. They gave no reasons, and relied upon the clause set out above. But it appeared that they desired to get rid of their co-partner, not because so to do was in any sense for the benefit of the firm in a mercantile

(q) *Hutchinson v. Whitfield*, Hayes Beav. 470.
(Ir. Ex.), 78.

(s) *Blisset v. Daniel*, 10 Ha. 493.

(r) See *Troughton v. Hunter*, 18

point of view, but because he objected to the appointment of one of his co-partner's sons as co-manager with his father. It further appeared that the offended father had gone and complained to the other partners behind the back of the expelled partner, and had prevailed upon them to sign the notice, intimating that either the expelled partner or himself must leave the firm. The expelling partners having resolved to exercise the power, induced the expelled partner to sign certain accounts, in order that he might be bound by them when expelled. Their intention to expel him was, however, concealed until after the accounts were signed; and the notice of expulsion, which gave him the first intimation of any design to get rid of him, was not served until he had signed the accounts. Under these circumstances, the Court declared that the notice of expulsion was void, and restored the expelled partner to his rights as a member of the firm.

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Having regard to the principles acted upon in cases of this description, it is conceived that a power to expel for misconduct cannot be safely acted upon until the delinquent partner has had an opportunity of explaining his conduct (*t*).

Opportunity for
explanation.

A power of expulsion cannot be exercised without the concurrence of *all* those whose concurrence may be required by the articles (*u*).

All must concur.

A notice of expulsion under one clause, cannot, if invalid, operate as a notice of dissolution under some other clause (*x*).

Notice of ex-
pulsion.

In a recent case it was provided, in effect, that if a partner should do or omit to do certain things, the others should be at liberty to dissolve the partnership, by giving notice to the partner who should offend; and that upon giving such notice the partnership should cease and be dissolved in the same manner, and with the same consequences, as if it had been determined by the voluntary retirement of the offending partner. The firm consisted of three partners, A., B., and C., who was B.'s son. B. was guilty of conduct for which he might

Smith v. Mules.

(*t*) See the judgment in the case 556.
last cited, and *Cooper v. Wands-*
worth Board of Works, 14 C. B. N.
S. 180.

(*x*) *Smith v. Mules*, 9 Ha. 556;
and see *Hart v. Clarke*, 6 De G.
Mac. & G. 232, and *Clarke v. Hart*,

(*u*) See *Smith v. Mules*, 9 Ha. 6 Ho. Lo. Ca. 633.

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have been compelled to retire. A. gave B. and C. notice that he dissolved the partnership under the clause above referred to. C., however, had done nothing rendering it competent for A. to expel him. It was therefore decided: 1, that A. had no right to expel B. without C.'s concurrence; 2, that A. had no right to dissolve the firm, so far as C. was concerned; 3, that C. having adopted the notice after it was given, A. could not treat the partnership as continuing; and 4, that the dissolution actually brought about was not a dissolution provided for by the articles, and did not, therefore, entail the consequences of a dissolution under them (*y*).

Power to expel
in case of omit-
ting to do things.

When a power of expulsion is given in the event of a partner omitting to do certain things, *e. g.*, entering in the partnership books all monies he may receive on account of the partnership, the power will not, as a rule, be exerciseable, unless the omission was a studied omission (*z*).

As to power to expel, in case a partner becomes insolvent, see *ante*, p. 827.

A power to expel contained in articles for a partnership for a term of years is not exerciseable after the term has expired, although the partnership may have been continued on the old footing (*a*).

14. Valuation of
shares.

14. *Valuation of shares.*—Having provided for the events upon which a partnership is to cease, the next point is to specify the method in which its affairs are to be wholly or partially wound up.

General rule
where the arti-
cles cannot be
acted on.

Where the articles have prescribed no method of winding up, or where the method prescribed cannot be carried into effect, then, unless the partners can come to some agreement as to what is to be done, there must, as a general rule, be a conversion of all the partnership property into money: and this money, after payment of the partnership debts, must be divided amongst the partners in the shares to which they may be entitled to it (*b*).

(*y*) *Smith v. Mules*, 9 Ha. 556.

(*z*) See *Smith v. Mules*, 9 Ha. 556.

(*a*) *Clark v. Leach*, 32 Beav. 14, and 1 De G. J. & Sm. 409.

(*b*) See *Cook v. Collingridge*, Jac.

607; *Kershaw v. Matthews*, 2 Russ. 62; *Wilson v. Greenwood*, 1 Swanst.

482. That this rule is not to be rigorously applied, see *Pettyt v.*

An agreement that on a dissolution the partnership property shall be fairly and equally divided, after payment of its debts, has been held to mean that the property shall be sold, and that the money produced by the sale shall be divided after the debts have been paid (*c*).

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Agreements for
fair division.

In order to prevent the ruin consequent on a sale when a partnership happens to be dissolved, several devices are had recourse to. The simplest is to specify in the articles a sum at which the share of an outgoing or deceased partner may be taken by his co-partners (*d*). But it is seldom possible to fix a sum beforehand, and consequently such a provision is not common. It is more usual to stipulate that the share shall be taken to be of the value appearing in the last-signed account, and be paid with the addition of subsequent profits, or with interest at a certain rate, in lieu of such profits. If a stipulation to this effect is made, and the accounts have been regularly taken and signed, so that the shares of the partners at the time of signing them appear from the accounts as intended, all parties must abide by the stipulation (*e*), although, of course, difficulties may arise as to the true construction of the articles (*f*). But if, as frequently happens, the accounts intended to be taken and signed have not been taken, or have been taken irregularly, so that the last-signed account is not so late a one as is contemplated by the articles, in such a case the account must be made up to the latest date at which it ought to have been made up, regard being had to the articles and the practice of the partners; and the share of the outgoing or deceased partner must be taken at its value, as the same appears by the account so taken.

Methods of
avoiding sale.

Effect of not
keeping accounts
as agreed.

Janeson, 6 Madd. 146, and *Simmons v. Leonard*, 3 Ha. 581, noticed *infra*.

(*c*) *Rigden v. Pierce*, 6 Madd. 353.

(*d*) Effect was given to such a provision in *Essex v. Essex*, 20 Beav. 442.

(*e*) *King v. Chuck*, 17 Beav. 325; *Gainsborough v. Stork*, Barn. 312.

(*f*) A provision that a share

shall be paid for as the same stood at the time of the last account, means as it stood in the partnership books. See *Blisset v. Daniel*, 10 Ha. 493, p. 511. See as to clauses of this description, *Coventry v. Barclay*, *ante*, pp. 823, 824, and *Browning v. Browning*, 31 Beav. 316, as to interest and subsequent drawings out.

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Pettyt v.
Janeson.

Thus, in *Pettyt v. Janeson* (*g*), the articles provided that the partnership accounts should be taken every 25th of March, and that if either partner died during the continuance of the partnership, his interest should be regulated by the last yearly settlement, and what should then appear to be due to him should be paid to his executors, with five per cent. interest, instead of subsequent profits. For some time the partnership accounts were regularly settled every 25th of March; but afterwards they were made up very irregularly, and often not for sixteen or eighteen months. A partner died in February, 1813. The last account prior to his death was settled on the 5th of November, 1811. The executors insisted that as there had been no annual settlement, as contemplated by the articles, they were entitled to a share of the profits calculated to the time of their testator's death. The surviving partner, on the other hand, contended that all they were entitled to was the amount of their testator's share, as appearing by the account settled in November, 1811, with interest thereon. But the Vice-Chancellor observed, "that the articles had two plain intentions—that there should be an annual settlement, and that the estate of a deceased partner should receive no profits for the fraction of the year since the last annual settlement. That the settlement of the 5th November, 1811, was to be considered as a settlement substituted by the agreement of the parties in the place of the settlement stipulated for in the articles. That if the testator had died on the 1st October, 1812, it could not have been contended that his estate was to take profits subsequent to the 5th November, 1811, being the last settlement within a year of the death; and if this were to be treated in that case as a settlement, within the spirit of the articles, against the testator's estate, it must be equally considered as a settlement for the testator's estate as a settlement on the 5th November, 1811, which bound each party to come to the next annual settlement on the 5th November, 1812. That the Court must act upon that which ought to have been done as if it had been done, and must declare the testator's estate entitled to a share in the profits

(*g*) 6 Madd. 146. See, also, as *Barclay*, 33 Beav. 1, and 3 N. R. to not signing accounts, *Coventry v.* 224, noticed *ante*, p. 823.

up to the 5th November, 1812, being the day which ought to have been the last annual settlement before the testator's death."

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The same principle was acted upon by V.-C. Wigram, in *Simmons v. Leonard* (*h*), although no account having ever been taken between the parties, and the day mentioned in the articles for taking the account not being apparently considered of much importance, the account directed to be taken did not stop at the day at which the last account would have been taken if the articles had been acted on. In *Simmons v. Leonard*, the articles provided that a general account and rest should be taken every 31st of December, or on such other day as the partners should agree upon; and that if a partner died during the term, his executors should receive payment of his share as ascertained at the last annual rest, with interest thereon, in lieu of subsequent profits; and that his executors should have no right to look into the partnership books. The provision relative to the annual settlement of an account was never acted upon at all. One of the partners died, and the Vice-Chancellor held that the primary object of all parties was, that the death of one of them should not cause a general dissolution and winding up; that this object might be attained, although no such account as was contemplated had been taken; that it was absolutely necessary to take an account of some sort, and to let the executors, therefore, look into the partnership books; and that, having regard to the omission of the partners to settle any account at all, the only account which could be taken was a general account of what was due to the testator at the time of his death for his share of capital and profits.

Simmons v.
Leonard.

These cases not only afford good illustrations of the rule that in construing partnership articles regard must be had to the conduct of the partners, even where a circumstance has arisen of which the partners had no previous experience (*i*), but they also show that the rule that there must be a sale of the partnership property whenever there is a dissolution, unless the articles provide for some other method of dealing with it, and the provisions in the articles are capable of being

(*h*) 3 Ha. 581.

(*i*) See, too, *Jackson v. Sedgwick*, 1 Swans. 460.

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Taking share at
a valuation.

rigorously carried out, must be taken with considerable qualification (*k*).

It is not unusual to stipulate that the share of an outgoing or deceased partner shall be taken by the continuing or surviving partners at a valuation. But this, although fair, is objectionable, inasmuch as a court of equity will not decree specific performance of such an agreement (*l*) unless the valuation has been made (*m*). It has, moreover, been recently held, that an agreement for a sale at a price to be fixed by valuers, one to be appointed by the seller and the other by the purchaser, or in case the valuers differ, by an umpire, does not enable the Court to appoint an umpire if the valuers will not do so, and are yet themselves unable to fix a price (*n*). In addition to these objections, there is the further one raised by *Wilson v. Greenwood* (*o*), which throws considerable doubt on the validity, in the event of a bankruptcy, of an agreement that the share of a bankrupt partner shall be taken at a valuation by his co-partners.

15. Introduction
of new partner in
lieu of a dead or
retired partner.

15. *Transmission of shares and introduction of new partners.*—

It is a common provision in partnership articles that on the death of a partner his executors, or his son, or some other person, shall be entitled to take his place. The effect of any such provision must of course depend on its words; but speaking generally it may be said,—

1. That clauses of this kind, although they bind the surviving partners to let in the person nominated (*p*), do not bind

(*k*) See, as to the rule referred to, *ante*, p. 830.

(*l*) See *Agar v. Macklew*, 2 Sim. & Stu. 418; *Blundell v. Brettargh*, 17 Ves. 232; *Gourlay v. The Duke of Somerset*, 19 Ves. 429; *Morgan v. Milman*, 3 De G. Mac. & G. 24; *Darby v. Whitaker*, 4 Drew. 134. The rule does not apply to a valuation of things which are accessories to the main purchase. See *Jackson v. Jackson*, 1 Sm. & G. 184.

(*m*) *Jackson v. Henderson*, 1 W. N. 360.

(*n*) *Collins v. Collins*, 5 Jur. N. S.

30, in the Rolls.

(*o*) 1 Swanst. 471. See, also, *Whitmore v. Mason*, 2 J. & H. 204.

(*p*) In *Wainwright v. Waterman*, 1 Ves. J. 311, a person was declared entitled to be admitted, although those with whom that question rested were divided in opinion. But in *Milliken v. Milliken*, 8 Ir. Eq. 16, it was held that a person who is to be let in, provided he conducts himself to the satisfaction of the survivors, is without remedy if they will not admit him.

him to come in, but give him an option whether he will do so or not (*q*). Bk. III. Chap. 9.
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2. That before making up his mind he is entitled to make himself acquainted with the state of the partnership affairs, although he is not entitled to have its accounts formally taken (*r*).

3. That if he is desirous of coming in, he must comply strictly with the terms upon which alone he is entitled to do so (*s*).

4. That if he declines to come in, and there is no provision as to what is then to be done, the partnership must be dissolved and wound up in the usual way (*t*).

As a general rule, and excluding cases of agency, an agreement between two persons cannot be enforced against either of them by a third person, even although such third person was intended to derive a benefit from the agreement (*u*). In a recent case it was attempted to apply this rule to an agreement between two partners, that on the death of one his widow should succeed him. One of the partners was dead; it was contended that his widow had no right to succeed. But it was held that the rule in question had no application to such a case; that the articles had created a valid trust in favour of the widow; and that she was entitled to come to the Court for a decree for the execution of such trust (*x*).

Person entitled to succeed will be assisted in equity.

In a case where articles provided that in the event of the death of a partner during the term for which the partnership was intended to last, his share should go to his widow for life, and after her death to his children, and in default of children to his widow's executors, administrators, or assigns; it was held that the children of a partner who had died leaving a

Cases of settled share.
Balmain v. Shore.

(*q*) *Pigott v. Bagley*, McCl. & Y. 569; *Madgwick v. Wimble*, 6 Beav. 495; *Downs v. Collins*, 6 Ha. 418; *Page v. Cox*, 10 Ha. 163. See, too,

and 2 De G. & J. 61; *Milliken v. Milliken*, *supra*, note (*q*). See *Ex parte Marks*, 1 D. & Ch. 499.

Pearce v. Chamberlain, 2 Ves. S. 33. (*t*) *Kershaw v. Matthews*, 2 Russ. 62; *Downs v. Collins*, 6 Ha. 418;

Madgwick v. Wimble, 6 Beav. 495.

(*r*) *Pigott v. Bagley*, McCl. & Y. 569.

(*u*) See *Colyear v. The Countess of Mulgrave*, 2 Keen, 81.

(*s*) *Holland v. King*, 6 C. B. 727; *Brooke v. Garrod*, 3 K. & J. 608,

(*x*) *Page v. Cox*, 10 Ha. 163.

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Appointment of
successor.
Ponton v. Dunn.

widow, did not take any vested interest in the partnership assets during her life (*y*).

In another case partnership articles provided that on the death of a partner the survivor should carry on the business for the benefit of himself and such person as the other should by will appoint, and, in default of appointment, for the benefit of his widow, or (if she should be dead) for the benefit of his children, and in default of children for the benefit of his executors or administrators; and that such person, or the said widow, children, executors, or administrators, should stand in the place of the deceased, and be entitled to the same share in, and have the same control over, the partnership trade and assets, as the deceased would himself have been entitled to if living. It was held that this was not, technically speaking, a power of appointment, and that consequently a partner could bequeath his share by a will which did not allude either to the power or to the partnership (*z*).

Position of in-
coming partner.

When a person has been admitted into an existing firm, and no express agreement has been made as to his rights and liabilities, the inference is that as between themselves his position is the same as that of the other partners. If they are bound by existing articles he will be bound by the same articles, if his conduct justifies the conclusion that he has assented to them; and if any special agreement is made with him, it will be regarded as incorporated with any previous agreement between the older partners, although of course, so far as the two may be inconsistent, the latest will prevail (*a*). If, indeed, the incoming partner has no knowledge of any prior agreement between the others, he cannot be bound thereby (*b*), for nothing that he can have done can be regarded under these circumstances, as evidence of any assent thereto on his part; and it is upon such presumed assent that the rule in question is founded.

16. Annuities to
widows, &c.

16. *Annuities to widows.*—Sometimes it is agreed that if a partner dies the survivor shall pay an annuity, or a share of the profits, to his widow. There is now no difficulty in framing

(*y*) *Balmain v. Shore*, 9 Ves. 500.

(*z*) *Ponton v. Dunn*, 1 R. & M.

402.

(*a*) See *Austen v. Boys*, 24 Beav.

598, and 2 De G. & J. 626.

(*b*) *Ibid.*

a clause of this sort without making the widow a partner or a quasi-partner by virtue of her participation in profits (c).

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If the annuity is made payable out of the profits, and the business is carried on and no profits are made, of course no annuity will be payable. So, if the surviving partner has an option to pay either an annuity or a share of the profits, and there should be no profits, he will not be bound to pay anything; for, *ex hypothesi*, it is competent for him to elect to pay out of the profits, and his right to make this election in no way depends on their amount (d). Moreover, in construing a provision giving a widow of a deceased partner a share of the profits, the partnership which, strictly speaking, determined when her husband died, is regarded as continuing, and the profits which she is to share must be ascertained on that principle. They ought not to be calculated as if the returns yielded by the new business had not to be applied in liquidating the demands on the old firm (e).

Annuity payable
out of profits and
none made.
Ex parte Harper.

In *Holyland v. De Mendez* (f) a continuing partner gave a bond conditioned to be void on payment of an annuity, or on being without his own default dispossessed of the partnership property assigned to him. It was held that the annuity did not cease on the bankruptcy of the continuing partner; dispossession by his assignees not being such a dispossession as was contemplated in the bond.

Annuity payable
until eviction.
Holyland v.
Mendez.

An agreement to pay an annuity out of profits involves an obligation not wilfully to prevent the earning of profits; and if, therefore, the person who has to pay the annuity wilfully ceases to carry on business, he becomes liable to an action for damages (g). In order, however, to provide as far as possible against any attempt to defeat the annuity by discontinuing the business, it is desirable that the partner continuing the business should covenant not only that he will carry on the business and pay the annuity, but that he will not transfer the business, or take in any fresh partner, without procuring from the transferee or new partner a similar covenant on his part.

Effect of discon-
tinuing business.

(c) See, as to this, *ante*, p. 49.

(f) 3 Mer. 184.

(d) *Ex parte Harper*, 1 De G. & J. 180.

(g) *Macintyre v. Belcher*, 14 C. B. N. S. 654.

(e) *Ibid.*

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17. Prohibitions
against continu-
ing in business.

Rule where there
is no prohibition.

17. *Prohibitions against carrying on business.*—A subject upon which it is always desirable to make some express agreement is the extent to which a retiring partner shall be restrained from commencing business on his own account, and in opposition to the continuing partner. In the absence of any agreement upon the subject, a retiring partner is as much at liberty to set up for himself, in opposition to the firm he has quitted, as he would be if he had never belonged to it; and on a general dissolution of partnership, all the partners are at liberty to commence business in opposition to each other, as freely as if they had never been partners, unless they have entered into some agreement not to do so. A dissolution *per se* obliges no partner to retire from business, or to refrain from seeking a livelihood in the manner in which he has been accustomed so to do, and in the neighbourhood where he is known (*h*).

Carrying on
business after
selling it.

Further, it is held, although it is certainly an extraordinary doctrine, that if a person sells the good-will of his trade or business, that does not disentitle him from recommencing a similar trade or business in the immediate vicinity of the place where the old one was carried on (*i*); and therefore, if it is agreed that a partnership shall be dissolved, and that one partner shall buy the other out, and this agreement is carried into effect, the retiring partner will nevertheless be at liberty to recommence business in the old line in the old neighbourhood (*j*). But he must not hold himself out as continuing *the* business which he has sold, and must not therefore carry it on in the name in which it was carried on before he sold it (*k*). At the same time, if that name happens to be his own, it is by no means clear that

(*h*) See *Farr v. Pearce*, 3 Madd. 78; *Davies v. Hodgson*, 25 Beav. 771.

(*i*) *Cruttwell v. Lye*, 17 Ves. 335; *Harrison v. Gardner*, 2 Madd. 198; *Kennedy v. Lee*, 3 Mer. 455; *Shackle v. Baker*, 14 Ves. 468. See, too, *Davies v. Hodgson*, 25 Beav. 177, and *Churton v. Douglas*, Johns. 174. In *Johnson v. Helleley*, 34

Beav. 63, notice of this right was directed by the Court to be given in the particulars of the sale of the goodwill.

(*j*) See *Kennedy v. Lee*, 3 Mer. 452; *Mellersh v. Keen*, 27 Beav. 236; *Bradbury v. Dickens*, ib. 53; *Smith v. Everett*, ib. 446.

(*k*) *Churton v. Douglas*, Johns. 174.

he could be restrained from carrying on business in that name (l). Bk. III. Chap. 9.
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The above propositions are well illustrated by the important case of *Churton v. Douglas* (m). There two of the plaintiffs, and the defendant, whose name was *John Douglas*, carried on business in partnership under the firm of *John Douglas & Co.*, as stuff merchants at Bradford. The defendant retired from the firm; a new partner was taken in; and the defendant assigned to his old partners and their new partner (being the plaintiffs) all his, the defendant's, share and interest in the old firm, and in the good-will thereof. The plaintiffs continued to carry on the old business under a new name, with the addition *late John Douglas & Co.* The defendant formed a new partnership with three persons who had been in the employ of the old firm, and whom he had enticed to leave the service of its successors and to join him; and he and his new partners commenced business as stuff merchants at Bradford, in a house adjoining the place of business of the old firm; and they did so in the name of *John Douglas & Co.* They further affixed that name to the house they had taken, and sent circulars to the old customers of the old firm, so as to lead them to suppose that the business of that firm was being continued by the defendant and his new partners. On a bill filed by the plaintiffs against the defendant it was held, (1), that he was entitled to carry on, by himself or in partnership with others, the kind of business previously carried on by him with his late partners; and, (2), that he was entitled so to do in the immediate neighbourhood of the place where he and his late partners previously carried on their business. But it was also held, (3), that the plaintiffs alone had the right to carry on the business previously carried on by *John Douglas & Co.*; (4), that the plaintiffs had the right to represent themselves as the successors of that firm; (5), that the defendant had no right to represent himself as its successor; (6), that he could not acquire such a right by taking other persons into partnership with him; and, (7), that although his name was *John Douglas*, he had not, either alone or in partnership with others, the

*Churton v.
Douglas.*

(l) See *ibid.*

(m) *Johns.* 174.

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right to carry on the old kind of business, in the old place, under the old name of *John Douglas & Co.* An injunction was granted accordingly to restrain the defendant from carrying on the business of a stuff merchant, at or in the immediate neighbourhood of Bradford, either alone or in partnership, under the style *John Douglas & Co.*, or in any other manner holding out that he was carrying on the business of a stuff merchant in continuation of, or in succession to, the business carried on by the late firm of *John Douglas & Co.*

Implied agreement not to continue in business.

An agreement by a partner that he will not carry on business in opposition to his late co-partners, may be implied from some other agreement into which he and they have entered. Thus where two persons became partners as brewers for eleven years, and it was provided in the articles that either of the parties, on giving six months' notice to the other, should be at liberty to *quit the trade and mystery of a brewer*, and that the other should be at liberty to continue the trade on his own account; it was held that one of the partners who had retired from the firm after giving notice to the other was not at liberty to continue in the trade at all (*n*).

Award disposing of business.

Again, where on the retirement of a partner, it was left to an arbitrator to determine what the continuing partner should pay for the good-will, and the arbitrator fixed a sum upon the understanding that the retiring partner would not commence a new business in the same street in which the old one was carried on; an injunction was granted restraining the retiring partner from carrying on business in that street, although the award itself was silent upon the point (*o*).

Sale of good-will.

So in *Churton v. Douglas* (*p*), the sale of the good-will was alone sufficient to preclude the seller from setting up business in the name of the old firm, as if he, and not the purchasers, were continuing the business sold.

Agreement not to carry on business enforced.

An agreement by a retiring partner not to commence business in opposition to his late partners, will, whether express or implied, be upheld and enforced, if the restriction imposed upon him is not unreasonable, having regard to the nature of

(*n*) *Cooper v. Watson*, 3 Dougl. 413; S. C. sub nomine *Cooper v. Watlington*, 2 Chitty, 451.

(*o*) *Harrison v. Gardner*, 2 Madd. 198.

(*p*) *Johns*. 174, ante 839.

the partnership business (*q*). Thus, in *Williams v. Williams* (*r*), Bk. III. Chap. 9. Sect. 3.
 the defendant, who had been in partnership with the plaintiffs, in running coaches between Reading and London, sold his share in the business to them, and covenanted not to run any coach between Reading and London, or so as to injure the business of the plaintiffs; and this covenant was enforced in equity. So, in the recent case of *Tallis v. Tallis* (*s*), the Court of Queen's Bench upheld a covenant entered into by a retiring member of a firm of booksellers not to carry on the canvassing trade in London, nor within 150 miles of the General Post-Office, nor in nor within fifty miles of Dublin or Edinburgh, nor in any town in Great Britain or Ireland in which the continuing partner or his successors might at the time have an establishment.

It may be observed that an agreement entered into when a partnership is formed, to the effect that a retiring partner shall not carry on the business carried on by the firm, can hardly be invalid for want of an adequate consideration (*t*). Consideration.

An agreement with a bankrupt to take his son into partnership, and to employ the bankrupt, is a sufficient consideration for an agreement by him not to carry on business in competition with the firm (*u*).

In framing articles of partnership between solicitors, provision should always be made respecting the deeds and documents in their possession, but belonging to their clients. Solicitors' papers, &c.

Of course no agreement which the solicitors may make

(*q*) See, generally, as to covenants not to carry on business, *Mitchell v. Reynolds*, 1 Smith's L. C.; also the useful table appended to *Avery v. Langford*, Kay, 663. Distances are measured as the crow flies, *Duignan v. Walker*, Johns. 446, and the cases there cited. As to infringements by supplying goods within the distance, see *Clark v. Watkins*, 1 N. R. 342, L. J.; *Turner v. Evans*, 2 E. & B. 512, and *Brampton v. Beddoes*, 13 C. B. N. S. 538. As to the construction of covenants by agents not to carry on

business to the detriment of their principals, compare *King v. Hansell*, 5 H. & N. 106, with *Mumford v. Gething*, 7 C. B. N. S. 305; and see *Turner v. Major*, 3 Giff. 442.

(*r*) 2 Swanst. 253. See, too, *Harrison v. Gardner*, 2 Madd. 198; *Whittaker v. Howe*, 3 Beav. 383.

(*s*) 1 E. & B. 391. See, too, *Atkins v. Kinnear*, 4 Ex. 776; *Reynolds v. Bridge*, 6 E. & B. 528.

(*t*) Per Lord Cranworth, in *Austen v. Boys*, 2 De G. & J. 626.

(*u*) *Clarkson v. Edge*, 33 Beav. 227.

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between themselves, will prejudice their clients. Subject to any question of lien, the clients are entitled to have their deeds and documents, and all drafts and copies thereof, paid for by them, delivered up on request (*x*). They have, moreover, a right to the joint assistance of all the members of the firm employed by them; and although, if the firm is dissolved, a client cannot insist that the partners shall continue to act as his solicitors, it is clear that they cannot, without his consent, turn him over to one of themselves (*y*), or act against him as if he had never been a client (*z*). The dissolution operates as a discharge of the client by the solicitors; and the client is thereupon entitled, subject to any question of lien, to have his deeds and papers delivered up to him (*a*).

But, as between the solicitors themselves, it is competent for them to agree that, if they dissolve partnership, the clients of the old firm, and all their deeds and papers, shall be divided amongst the partners, or belong solely to the partner who continues to carry on the business of the firm; and such an agreement will be enforced (*b*). If no such agreement is come to, each partner may, after a dissolution, do his best to induce the old clients to continue him as their sole solicitor.

18. Good-will.

18. *Good-will*.—In connection with the subject considered under the last head, it is necessary to allude to the good-will of a trade or business.

Nature of good-will.

The term good-will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good-will has a marketable value, whether the business is that of a professional man or of any other person (*c*). But it is plain

(*x*) *Ex parte Horsfall*, 7 B. & C. 587; *Colegrave v. Manley*, T. & R. 528. 400; and see *Vaughan v. Vander-*

(*y*) *Cook v. Rhodes*, 19 Ves. 272, note. *stegen*, 2 Drew. 409.

(*z*) *Cholmondeley v. Clinton*, 19 Ves. 261. (*b*) *Whittaker v. Howe*, 3 Beav. 383. See, however, *Davidson v. Napier*, 1 Sim. 297.

(*a*) *Griffiths v. Griffiths*, 2 Ha. (*c*) Good-will is property within

that good will has no meaning except in connection with a continuing business (*d*); and the value of the good-will of any business to a purchaser depends, in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business has been previously carried on.

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When a partnership is dissolved, the question arises, What is to be done with its good-will? Now it has just been seen that there is no obligation on the part of any of the partners to retire from business merely because the partnership between them is dissolved; and that even on the sale of good-will, the vendors are at liberty to continue to carry on business on their own account. It obviously follows, that the good-will of a valuable partnership business may be practically worthless, at least to any one except a former partner desiring to continue the business of the firm (*e*). It is only so far as good-will has a saleable value that it can be regarded as an asset of any partnership; and the good-will of a business is frequently of no value at all, except in connection with the place of business. This, however, is by no means always the case. The value of the good-will of a newspaper, for example, attaches to its name, and is scarcely, if at all, dependent on the place of publication.

Whatever saleable value the good-will of a partnership business has, must be considered as belonging to the firm, unless there is some agreement to the contrary; and it follows from this—

Good-will assets
of the firm.

1. That if a firm is dissolved, and there is no agreement to the contrary, the good-will must be sold for the benefit of all the partners, if any of them insist on such sale (*f*);

2. That, so far as is possible, having regard to the right of every partner to carry on business himself, the Court of

the meaning of the stamp acts, *Potter v. The Commissioners of Inland Revenue*, 11 Ex. 147. See, also, 17 & 18 Vict. c. 83, § 19; and *infra*, p. 850, note (*r*).

28 Beav. 529.

(*e*) See *Davies v. Hodgson*, 25 Beav. 177, where the good-will was treated as valueless on this very ground.

(*d*) See as to a legacy of good-will, apart from any share in a business, *Robertson v. Quiddington*,

(*f*) *Bradbury v. Dickens*, 27 Beav. 53, and the cases cited, *infra*.

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Chancery will, on a dissolution, interfere to protect and preserve the good-will until it can be sold (*g*);

3. That if a partner has himself obtained the benefit of the good-will, he can be compelled to account for its value, *i.e.*, for what it would have sold for, he being himself at liberty to compete in business with the purchaser (*h*).

Good-will in
case of death.

In the event of dissolution by death, it has been said that the good-will survives, and there is a clear decision to this effect (*i*). But this is not in accordance with modern authorities; they are wholly opposed to the notion that the value of the good-will, as such, belongs to the survivor (*k*). It undoubtedly may happen that the survivor may obtain the benefit of the good-will without paying for it; for he is at liberty (unless restrained by agreement) to carry on business on his own account (*l*), and possibly in the name of the late firm (*m*). Under these circumstances, if, on the death of a partner, the good-will is put up for sale, it will produce nothing if it is known that the surviving partner will exercise his rights. He will therefore acquire all the benefit of the good-will; but he does not acquire it by survivorship, as something belonging to him exclusively, and with which the executors of the deceased partner have no concern; for if he did, he might sell the good-will for his own benefit, and this he cannot do (*n*). When, therefore, it is said that on the death of one partner the good-will of the firm survives to the other, what is meant is, that the survivor is entitled to all the advantages incidental to his

(*g*) See *Turner v. Mayor*, 3 Giff. 442, where, however, there was an express agreement for the sale of the goodwill. In *Lewis v. Langdon*, 7 Sim. 425, the V.-C. Shadwell seemed to think that a surviving partner was under no obligation to preserve the good-will. But his opinion was probably influenced by *Hammond v. Douglas*, 5 Ves. 539, which was not then overruled.

(*h*) *Smith v. Everett*, 27 Beav. 446; *Mellersh v. Keen*, *ib.* 236, and 28 Beav. 453.

(*i*) *Hammond v. Douglas*, 5 Ves.

539.

(*k*) *Wedderburn v. Wedderburn*, 22 Beav. 104; *Smith v. Everett*, 27 Beav. 446, and *Mellersh v. Keen*, *ib.* 236, and 28 Beav. 453.

(*l*) *Farr v. Pearce*, 3 Madd. 74; *Davies v. Hodgson*, 25 Beav. 177.

(*m*) See as to this, *infra*, note (*s*).

(*n*) See *Smith v. Everett*, 27 Beav. 446; *Mellersh v. Keen*, *ib.* 236, and 28 *ib.* 453; *Wedderburn v. Wedderburn*, 22 Beav. 104. *Hammond v. Douglas*, 5 Ves. 539, *contra*, cannot be regarded as now law.

former connection with the firm, and that he is under no obligation, in order to render those advantages saleable, to retire from business himself (o).

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Again, when a partner retires not only from the firm, but from the business carried on by it, the continuing partners will acquire the benefit arising out of the good-will for nothing; unless it has been agreed that they shall pay for it; for they retain possession of the old place of business, and they continue to carry on that business under the old name. This, in fact, secures the good-will to them, and they cannot be compelled to pay separately for it, unless some agreement to that effect has been entered into (p).

Good-will in
case of retire-
ment of one
partner.

The right to continue the use of a partnership name is frequently the most important element in the good-will, and is governed by principles similar to those applicable to it. The purchaser of the good-will of a business acquires the right not only to represent himself as the successor of those who formerly carried it on (q), but also to prevent other persons from doing the like (r). If then the good-will of a partnership business has any saleable value at all, it seems impossible to hold that on a dissolution of a partnership, whether by death or otherwise, any partner can continue the old business in the old name for his own benefit, unless there is some agreement to that effect, or at least to the effect that the assets are not to be sold. Such a right on his part is inconsistent with the right of the other partners to have the good-will sold for the common benefit of all. There are, however, authorities tending to show that, in the case of death, the surviving partners are entitled to continue to carry on business in the old name (s), and to restrain the executors of the deceased partner from doing the like (t). But if these cases are carefully examined, they will be found scarcely to warrant so general a proposition. In

Good-will in con-
nection with use
of name.

(o) See *Farr v. Pearce*, 3 Madd. 74; *Davies v. Hodgson*, 24 Beav. 177; *Mellersh v. Keen*, 27 Beav. 236, and 28 ib. 453.

(p) See *infra*.

(q) *Churton v. Douglas*, Johns. 174, *ante*, p. 839.

(r) *Ib*.

(s) *Webster v. Webster*, 3 Swanst. 90; *Lewis v. Langdon*, 7 Sim. 421; *Robertson v. Quiddington*, 28 Beav. 536; *Banks v. Gibson*, 34 Beav. 566.

(t) *Lewis v. Langdon*, 7 Sim. 421.

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Webster v. Webster (*u*), the executors of a deceased partner sought to restrain the surviving partners from carrying on business in the name of the old firm; but the application was based upon the untenable ground that by so doing the surviving partners exposed the estate of the deceased partner to continued liability. No question of good-will appears to have been in dispute. In *Lewis v. Langdon* (*x*), the V.-C. Shadwell certainly intimated his opinion to be, that surviving partners had a right to continue to carry on business in the old name (*y*); but the real question there was, whether the executors of a deceased partner were entitled to continue the use of that name; and it was held that they were not, which is quite consistent with the absence of the same right on the part of the surviving partner. There seems, moreover, to have been some agreement not set out in the report (*z*), which influenced the judge's decision; and at the time it was pronounced the doctrine that good-will is, if saleable, a partnership asset, was not so well established as it is at present.

Continued use of
name only wrong
on one of two
grounds.

In considering this question, the right of a late partner not to be exposed to risk by having his name continued in a business must not be forgotten (*a*); and where his name is part of the name of the firm, *e. g.*, if his name is A. B., and the name of the firm is A. B. & Co., so long as he lives he would, it is apprehended, in the absence of an agreement to the contrary, be entitled to restrain his late co-partners and their representatives from carrying on business under the old name, and so continually exposing him to risk. Neither his executors, however, nor his assignees in bankruptcy, would have the same right on the same ground; for they would not be exposed to risk. Their right, and indeed the right of any partner whose name does not appear in the name of the firm, to prevent the continuance of the use of the name of the firm can only be maintained upon the ground that such right is involved in the

(*u*) 3 Swanst. 490.

(*x*) 7 Sim. 421.

(*y*) See, too, *per* Lord Romilly,
in 28 Beav. 536.

(*z*) See the last line in 7 Sim. 425.

(*a*) See *Routh v. Webster*, 10

Beav. 561; *Bullock v. Chapman*,
9 De G. & Sm. 211; *Troughton v.*
Hunter, 18 Beav. 470. Query if
this was sufficiently borne in mind
in *Banks v. Gibson*, 34 Beav. 566.

more general right of having the partnership assets, including the good-will, sold for the common benefit. And if upon a dissolution this right is waived, or if the terms of dissolution are such as to preclude its exercise, then each partner can not only carry on business in competition with the others, but each can represent himself as late of, or as successor to, the old firm: and if he does not hold out the other partners as still in partnership with himself, each may use the old name without qualification (*b*).

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The use of a partnership trade mark is another very important element in the good-will of its business; and it is clearly settled by recent decisions that a partnership trade mark is an asset of the firm, saleable on a dissolution like any other asset (*c*).

Good-will in connection with trade marks.

In framing articles of partnership, too great care cannot be taken to express as clearly as possible what is intended to be done with respect to good-will; and in order to avoid all ambiguity, the word itself should be made use of. There are cases which show that an agreement to take a retiring partner's share in the property and effects of the partnership (*d*), or in the partnership premises (*e*), do not entitle him to anything in respect of good-will. But in a late case a clause authorising a surviving partner to take the stock of the partnership at a valuation was held to entitle the executors of a deceased partner to a share of the value of the good-will of the partnership, and of a trade mark belonging to it (*f*).

Agreements as to paying for good-will.

Good-will is generally valued at so many years' purchase on the amount of profits.

Valuation of good-will.

When an agreement is entered into, to the effect that a retiring partner shall be entitled to be paid for his interest in the good-will of the firm, it is material to determine whether

(*b*) See *Banks v. Gibson*, 34 Beav. 566, and the cases cited in the last four notes. See, as to describing oneself as late with or from another, *Glenny v. Smith*, 2 Dr. & Sm. 476.

(*c*) See *Bury v. Bedford*, 10 Jur. N. S. 503; *Hall v. Barrows*, ib. 55. And see, as to trade marks generally, *Leather Cloth Co. v. American*

Leather Cloth Co., 11 Ho. Lo. Ca. 523, reversing S. C. 1 Hem. & M. 271; *Kinahan v. Bolton*, 15 Ir. Ch. 75.

(*d*) See *Hall v. Hall*, 20 Beav. 139; *Kennedy v. Lee*, 3 Mer. 452.

(*e*) *Burfield v. Rouch*, 31 Beav. 241.

(*f*) *Hall v. Barrows*, 10 Jur. N. S. 55.

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the firm is to be regarded as of definite or of indefinite duration. For upon this will depend the amount to be paid to the retiring partner.

Austen v. Boys.

In *Austen v. Boys* (*g*), a partnership was entered into for seven years, with power for any partner to retire. In case of retirement the retiring partner was to be paid by the continuing partners the fair market value of his interest and share in the partnership business, and in the good-will thereof. Two days before the expiration of the seven years, one of the partners retired, and the question arose, whether in ascertaining the value of his interest in the good-will of the business, the partnership business was to be considered as continuing, or as ending at the expiration of the seven years. It was held that the good-will to be valued, was the good-will of a business ending with the seven years, and that therefore the retiring partner's interest in it was nominal merely.

Wade v. Jenkins.

In *Wade v. Jenkins* (*h*), partnership articles stipulated that the good-will should be deemed to be of the value of 6000*l.* and should belong to the partners in the proportions in which they were entitled to the capital, but that the value of the good-will should not be taken into account in any of the accounts between the partners. On the death of one of the partners it was held that he was entitled to a share of the good-will; and that the last-mentioned stipulation only applied to the accounts taken during the continuance of the partnership.

Turner v. Major.

In *Turner v. Major* (*i*), partners agreed to dissolve and to have the assets of good-will sold by two persons selected by them; an injunction was granted to restrain one of the partners from violating this agreement, by carrying on business on his own account before the good-will of the partnership had been disposed of.

19. Getting in
debts on dissolution.

19. *Getting in debts.*—When a firm is dissolved, it is usual to appoint one of the partners, or some third person, to collect and get in the debts of the firm. But notwithstanding any such arrangement and notice thereof, a debtor to the firm will be discharged if he pays to any one of the partners (*k*). A

(*g*) 24 Beav. 598, affirmed 2 De G. & J. 626.

(*h*) 2 Giff. 509.

(*i*) 3 Giff. 442.

(*k*) *Ante*, p. 279.

court of equity will, however, give effect to an agreement of the nature in question, by appointing a receiver, and, if necessary, granting an injunction (*l*). If the agreement is under seal and is broken, an action may be brought upon it (*m*). But it has been held that an agreement not under seal entered into between two members of a dissolved partnership, to the effect that one of them shall get in the debts of the firm, and pay what he shall receive in respect thereof to his co-partner, is not an agreement on which the latter can maintain any action in case the debts are got in, and the money received on account of them is not paid over; for it is said there is no consideration for such an agreement (*n*). But it seems to have been admitted, in the case in which this was decided, that if the partner to whom the money when received is to be paid, agrees that he will take no steps to collect the debts himself, that will be a sufficient consideration to support the promise to pay.

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When a partner retires, on the terms that the continuing partners are to get in the old debts, and that such debts, when got in, are to be taken into account in ascertaining the share of the retiring partner, the latter will have a right to charge the continuing partners with whatever debts they may chose to take to themselves and not get in. As observed by Lord Romilly: "If continuing partners who are bound to get in debts belonging to an old firm, think fit to enter into a new agreement with the debtors of the old firm, by which those debtors become the debtors of the new firm, and the debts of the old firm become merged in that of the new firm by a security taken for the aggregate debt, such continuing partners are liable to the retiring partners for the amount of the old debt as one of the assets received by them" (*o*).

Getting in debts
when one firm
succeeds another.

20. *Assignment of share, &c.*—When a partner retires or dies, and he or his executors are paid what is due in respect of his share, it is customary for him or them formally to assign and release his interest in the partnership, and for the continuing

20. Assignment
of share, &c.,
by retiring
partner.

(*l*) *Davis v. Amer*, 3 Drew. 64.

(*m*) As in *Belcher v. Sikes*, 8 B. & C. 185.

(*n*) See *Lewis v. Edwards*, 7 M. & W. 300, where such an agree-

ment was come to between a solvent partner and the assignees of a bankrupt partner.

(*o*) *Lees v. Laforest*, 14 Beav. 262.

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or surviving partners to take upon themselves the payment of the outstanding debts of the firm, and to indemnify their late partner or his estate, from all such debts.

Assignment of
debts.

An assignment of all the partnership stock, debts, sums of money, and all other the personal estate and effects of the assignors as partners, does not give the assignees a right to sue one of the assignors for a debt due from him to the partnership (*p*). But if one of the assignors after the execution of the deed releases a debt which has been assigned, or negotiates a bill held by the firm, he becomes liable to an action, for he has no right to derogate from his own grant (*q*).

Stamp on assign-
ment by outgoing
partner.

An assignment by a partner of his share and interest in the firm to his co-partners, in consideration of the payment by them of what is due to him from the firm, is regarded as a *sale* of property within the meaning of the Stamp acts; and consequently the deed of assignment requires an *ad valorem* stamp (*r*). But if the retiring partner, instead of assigning his interest, takes the amount due to him from the firm, gives a receipt for the money, and acknowledges that he has no more claims on his co-partners, they will practically obtain all they want; and such a transaction, even if carried out by deed, could hardly be held to amount to a sale; and no *ad valorem* stamp would be payable.

21. Usual in-
demnity.

21. *Indemnity to outgoing partner*.—The indemnity is ordinarily given by a bond or covenant entered into by the continuing or surviving partners, in consideration of the assignment to them of all the share and interest of the retiring or deceased partner. The bond or covenant should be joint and several, for if it is joint only it cannot be treated as several, even in a

(*p*) See *Aulton v. Atkins*, 18 C. B. 249.

(*q*) *Aulton v. Atkins*, 18 C. B. 249.

(*r*) *Christie v. Commissioners of Inland Revenue*, L. R. 2 Ex. 46; *Potter v. The Commissioners of Inland Revenue*, 10 Ex. 147. These cases overrule *Belcher v. Sikes*, 6 B. & C. 234. In *Steer v. Crowley*, 14

C. B. N. S. 337, a release by the executors of a deceased partner did not state the consideration, and bore only a common deed stamp; and it was held that the deed was a good document of title, although some penalty might be payable by the parties to it, or their solicitors, for not stating the consideration.

court of equity (s). The effect of such a bond or covenant is to render a retiring partner, as between himself and his late co-partners, a surety only for the payment of the partnership debts (t); and to render him their specialty creditor if, notwithstanding their indemnity, he is compelled to pay those debts (u).

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It is to be observed, that in the absence of any agreement to that effect, a retiring partner or the executor of a deceased partner has no right to an indemnity from the other partners, except so far as he may be entitled to have the assets of the firm applied in payment of its debts, and to enforce contribution in case he has to pay more than his share of those debts. But if all the assets of the firm are assigned to the continuing or the surviving partners, it is only fair that they should undertake to pay its debts; and if it appears that it was the intention of all parties that they should do so, effect will be given to such intention, although the undertaking on their part is not explicit in its terms (x).

Right to indemnity.

When a retiring partner assigns his interest in the partnership assets, and obtains from the continuing partners a covenant of indemnity, his lien on the partnership assets seems to be at an end. In a recent case the assignment was made expressly subject to the payment of the retiring partner's share of the partnership debts. The continuing partner became bankrupt; and the retiring partner's executors were compelled to pay the unsatisfied partnership debts. It was nevertheless held that they had no lien on the specific assets of the old firm, but were driven to their remedy on the covenant for indemnity (y).

Effect of express indemnity on lien.

22. *Arbitration clauses*.—With respect to these, it is to be observed:—

22. Arbitration clauses.

1. That an agreement to refer to arbitration is one which

(s) *Sumner v. Powell*, 2 Mer. 30, Hem. & M. 182.
and T. & R. 423.

(t) *Rodgers v. Maw*, 4 Dowl. & L. 66; *Oakley v. Pasheller*, 4 Cl. & Fin. 207, ante, p. 452. See, however, as to the extent of this doctrine, *Oakford v. European and American Steam Shipping Co.*, 1

(u) *Musson v. May*, 3 V. & B. 194.

(x) See *Saltoun v. Houstoun*, 1 Bing. 433.

(y) *Langmead's trusts*, 7 De G. Mac. & G. 353. See, too, *Lingen v. Simpson*, 1 Sim. & Stu. 600.

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a court of equity will not decree to be specifically performed (z); and

2. That it is one which (independently of the Common law procedure act of 1854) cannot be effectually set up as a defence to any action or suit relative to a matter agreed to be referred (a); unless indeed, the reference has been expressly made a condition precedent to the right to sue (b). At the same time a court of equity will sometimes decline to interfere between partners who have agreed that their disputes should be referred to arbitration, and who have not attempted so to settle them (c).

17 & 18 Vict. c.
125, § 11.

By 17 & 18 Vict. c. 125, which contains several important provisions respecting agreements to refer to arbitration, it is amongst other things (by § 11) enacted, that "Whenever the parties to any deed or instrument in writing, to be hereafter made or executed, or any of them, shall agree (d) that any then existing or future differences between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them or any person or persons claiming through or under him or them, in *respect of the matters so agreed to be referred*, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance, and before plea or answer, upon being satis-

(z) *Agar v. Macklew*, 2 Sim. & Stu. 418; *Street v. Rigby*, 6 Ves. 818. An action will lie for not referring in pursuance of an agreement so to do, *Livingston v. Ralli*, 5 E. & B. 132.

(a) *Wellington v. McIntosh*, 2 Atk. 569; *Michell v. Harris*, 4 Bro. C. C. 311, and 2 Ves. J. 129; *Street v. Rigby*, 6 Ves. 814; *Thompson v. Chamock*, 8 T. R. 139.

(b) See *Scott v. Avery*, 5 Ho. Lo. Ca. 811; *Halfhide v. Fenning*, 2 Bro. C. C. 336. The last case is generally regarded as overruled,

but *quære* whether it is not capable of being supported on the principle recognised in *Scott v. Avery*. See, too, the observations of Lord St. Leonards in *Dimsdale v. Robertson*, 2 Jo. & Lat. 91.

(c) *Waters v. Taylor*, 15 Ves. 10.

(d) In *Blyth v. Lafone*, 1 E. & E. 435, it was held that the agreement to refer must be contained in the instrument on which the dispute arises. But this has reasonably been doubted. See *Mason v. Haddan*, 6 C. B. N. S. 526.

fied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matter so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise, as to such court or judge may seem fit; provided always that any such rule or order may at any time afterwards be discharged or varied, as justice may require."

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17 & 18 Vict. c.
125.

The section, it will be observed, is not imperative; and the courts in the exercise of their discretion have declined to interfere where there were several matters in dispute, some only of which were within the agreement to refer (*e*); where one of the parties had become bankrupt (*f*); where there was a *bonâ fide* suggestion of fraud (*g*); where there was really no question in dispute, and the defendant's only object was delay (*h*); where the plaintiff sought to have a partnership dissolved, on the ground of the defendant's misconduct, and to have a receiver appointed (*i*).

Where, however, there is a *bonâ fide* dispute within the meaning of an agreement to refer, and there is no satisfactory reason why such dispute should not be settled by arbitration, legal proceedings will be stayed (*k*).

Under a general submission by partners of all matters in difference between them, an arbitrator may dissolve the partnership (*l*); and may order one partner to pay or give security for the payment of a certain sum to the other (*m*); and apportion

Power of arbitrator.

(*e*) *Wheatley v. Westminster, &c.*, 2 Dr. & Sm. 347. *v. Robson*, 2 W. N. 66.

(*f*) *Pennell v. Walker*, 18 C. B. 651. (*k*) As in *Russell v. Pelligrini*, 6 E. & B. 1020; *Hirsch v. Thurn*, 4 C. B. N. S. 569.

(*g*) *Wallis v. Hirsh*, 1 C. B. N. S. 316. (*l*) *Green v. Waring*, 1 W. Blacks. 475; *Hutchinson v. Whitfield*,

(*h*) *Lury v. Pearson*, ib. 639. The true grounds of this decision appear to have been those stated above, but the report is obscure. Hayes, Ir. Ex. 78. *Simmonds v. Swaine*, 1 Taunt. 548, shows that a dissolution need not be awarded.

(*i*) *Cook v. Catchpole*, 10 Jur. N. S. 1068, V.-C. W. See, also, *Wood* (*m*) *Simmonds v. Swaine*, 1 Taunt. 543.

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the assets between them (*n*); and order conveyances to be made (*o*); and direct one partner to sue in the name of himself and others, and give them a bond of indemnity (*p*); and restrain one partner from carrying on business within certain limits (*q*); and direct mutual releases to be executed (*r*). It seems, however, that the arbitrator cannot appoint a receiver to collect and get in the partnership assets and credits (*s*); nor direct one of the partners to pay money to him (the arbitrator) in order that he may apply it in payment of certain specified debts (*t*). It has also been held that an arbitrator cannot enter into the question whether any part of a premium paid on entering into the partnership shall be refunded, unless the submission pointedly raises that question for determination (*u*).

23. Penalties,
&c.

23. *Penalties and liquidated damages.*—The last clause in a partnership deed is often one by which each partner binds himself to pay, either by way of penalty or by way of liquidated damages, a certain sum in case of the infringement by him of any agreement contained in the previous clauses. A stipulation that on the breach of any agreement in the articles, a sum shall be paid by way of penalty is of little real use; for the sum mentioned will not be payable unless damage to its amount can be proved (*x*). Moreover, a stipulation that for any breach, however small, a large sum shall be paid by way of liquidated damages, is always construed by the courts as a stipulation for payment of that sum by way of penalty (*y*).

(*n*) *Lingood v. Eade*, 2 Atk. 505;
Wood v. Wilson, 2 Cr. M. & R. 241;
Wilkinson v. Page, 1 Ha. 276.

(*o*) *Wood v. Wilson*, 2 Cr. M. & R. 241.

(*p*) *Burton v. Wigley*, 1 Bing. N. C. 665; and see *Goddart v. Mansfield*, 19 L. J. Q. B. 305; *Philips v. Knightley*, 2 Str. 903.

(*q*) *Morley v. Newman*, 5 D. & R. 317. In *Burton v. Wigley*, 1 Bing. N. C. 665, the award permitted a partner to carry on business, although the articles provided for his not doing so.

(*r*) *Lingood v. Eade*, 2 Atk. 505,

where the arbitrator directed such releases to be settled by a Master in Chancery.

(*s*) *Lingood v. Eade*, 2 Atk. 505; *Re Mackay*, 2 A. & E. 356. But a receiver was appointed in *Routh v. Peach*, 2 Anstr. 519, and 3 ib. 637.

(*t*) *Re Mackay*, 2 A. & E. 356.

(*u*) See *Tattersall v. Groote*, 2 Bos. & P. 131.

(*x*) See the note to *Gainsford v. Griffith*, 1 Wms. Saund. 57.

(*y*) See *Kemble v. Farren*, 6 Bing. 141; *Ranger v. The Great Western Rail. Co.*, 5 Ho. Lo. Ca. 119.

An agreement to pay a definite sum as liquidated damages in one or two specified events, *e.g.*, on carrying on business within prescribed limits, may no doubt prove useful (z); but even in these cases it must not be overlooked, that if the stipulated sum is paid, a court of equity will not interfere by injunction (a). The mere existence of an agreement for liquidated damages does not, however, necessarily make a contract alternative, and preclude such interference (b).

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(z) *Atkins v. Kinnear*, 4 Ex. 776; *Reynolds v. Bridge*, 6 E. & B. 528, may be referred to as examples. See, too, *The East India Co. v. Blake, Finch*, 117, where it was held that though a court of equity would relieve against a penalty, it would not relieve against payment of liquidated damages.

(a) *Sainter v. Ferguson*, 1 Mac. & G. 286; *Woodward v. Gyles*, 2 Vern. 119.

(b) *Coles v. Sims*, 5 De G. Mac. & G. 1; and see *Avery v. Langford*, Kay, 663; *Clarkson v. Edge*, 33 Beav. 227.

CHAPTER X.

OF ACTIONS AND SUITS BETWEEN PARTNERSHIPS AND COMPANIES AND THEIR MEMBERS, AND BETWEEN THE MEMBERS THEMSELVES.

SECTION I.—GENERAL OBSERVATIONS.

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THE mutual rights and obligations of partners, shareholders, and directors, having been examined, it is proposed in the next place to consider the means by which those rights and obligations can be enforced.

Legal proceedings between partners.

There is no method by which an ordinary firm can sue or be sued by any of its members, either at law or in equity; for the firm, as distinguished from the persons composing it, has no juridical existence. All proceedings, therefore, which have for their object the enforcement of the mutual rights and obligations of partners, must be taken by some or one of the members of a firm individually against some others or other of them also individually. The consequences of this rule are important, for it follows from it—

1. That no action at law can be brought by one partner against another for the recovery of money or property payable to the firm as distinguished from the partner suing;

2. That no criminal prosecution is sustainable by one partner against another for what he may do with the property of the firm (*a*); and

(*a*) In *R. v. Evans*, 9 Jur. N. S. 184, a partner who misrepresented the partnership accounts, and thereby obtained more than his share of money, was held not liable to conviction for obtaining money under false pretences. And in *R. v. Loose*, 29 L. J. M. C. 633, *R. v. Marsh*, 3 Fos. & Fin. 523, *R. v.*

Bren, 3 N. R. 176, members of friendly societies indicted for stealing the moneys of the societies were held not liable to conviction. However, in *R. v. McDonald*, 7 Jur. N. S. 1127, a servant who was paid a salary and a percentage of profits was convicted of embezzlement; and in *R. v. Burgess*, 2 N. R. 85,

3. That no suit in equity is maintainable by one partner against another with respect to a matter in which the firm is interested, without bringing all the members thereof before the court. This rule is subject to exceptions, as will be seen hereafter, but it is established as a rule, and flows from the non-recognition of the firm.

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These consequences, which are much more serious to large partnerships than to small, are avoided by incorporating the firm; for a member of a body corporate may sue or be sued by it just as if he were not a member; and whether the body corporate is a company having gain for its object or not, is wholly immaterial with reference to its capacity of suing and being sued. Therefore, in a late case, it was held that a registered joint-stock company could support an action against one of its own shareholders for damages for a libel on the company published by him (b). A shareholder of an incorporated company may be a creditor of or debtor to the company, just as if he were not a member of it. It follows from this, that he may not only sue it at law, but having obtained judgment against it, he may execute that judgment against his co-shareholders, if they are liable to be proceeded against in that way by ordinary creditors. Moreover, a court of equity will not interfere at the instance of the shareholders proceeded against, and stay execution against them, either on the ground that the plaintiff is himself a member of the company, and bound therefore to contribute to his own payment, or upon the ground that the rights of the parties cannot be ascertained without taking the accounts of the company. In the case supposed the plaintiff is a creditor of the company, and not the less so for being a shareholder in it; and to deprive him of his rights as a creditor would be to defeat one of the objects for which the company, as such, has any existence (c). But a shareholder will not be allowed to buy up and put in force against a

Effect of incorporation.

and in *R. v. Webster*, 7 Jur. N. S. 1208, a member of a friendly society was convicted of larceny, and in *R. v. Proud*, 10 W. R. 62, of embezzlement. In the last three cases, however, there were special circumstances as regards the posses-

sion of the money and the trust reposed in the prisoner.

(b) *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87.

(c) See *Rheam v. Smith*, 2 Ph. 726; *Hardinge v. Webster*, 1 Dr. & Sm. 101.

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Effect of enabling company to sue and be sued by a public officer.

shareholder a debt of the company, if the object of the execution creditor is to obtain by means of that debt payment of other monies to which he is not justly entitled (*d*).

The institution of a public officer to sue and be sued on behalf of the members of an unincorporated company, is not necessarily so efficacious for the purposes now under discussion as the incorporation of the company. For the public officer may be so constituted as to represent the members as individuals, and only to represent them all, and not all less some or one of them. If in such a case he sues one of the members of the company which he represents, he in fact either represents the member sued as well as all the other members, or nobody at all, and in either case his suit will be improper (*e*). In most modern acts of Parliament, however, care has been taken to avoid this objection, and to render the public officer the representative of the company as distinct from the individuals composing it; and where this is done, legal proceedings between the public officer and those individuals or any of them, are theoretically as unobjectionable as are legal proceedings between incorporated companies and their shareholders. The tendency in modern times, moreover, is to regard companies empowered to sue and be sued more in the light of corporate bodies than formerly, and to treat public officers as the representatives of corporations rather than as the representatives of the individual shareholders (*f*). With respect to the most important of the companies in question, viz., banking companies governed by 7 Geo. 4, c. 46, it is settled that the public officer is the proper person to sue a shareholder for calls made payable by him to the company (*g*), and to sue the

(*d*) *Woodhams v. Anglo-Australian, &c., Co.*, 2 De G. J. & Sm. 162, and other cases referred to at the end of this section.

(*e*) See *Hichens v. Congreve*, 4 Russ. 562; *McMahon v. Upton*, 2 Sim. 473; *Hughes v. Thorpe*, 5 M. & W. 656; *Seddon v. Connell*, 10 Sim. 58. See, too, *per* Lord Eldon in *Van Sandau v. Moore*, 1 Russ. 460 and 472.

(*f*) See *Lawrence v. Wynn*, 5 M. & W. 355; *Skinner v. Lambert*, 4 Man. & Gr. 477; *Wills v. Sutherland*, 4 Ex. 211, affirmed in error, 5 Ex. 715, in each of which an action for calls by a public officer was successful. See, too, *Smith v. Goldsworthy*, 4 Q. B. 430; *Reddish v. Pinnock*, 10 Ex. 213.

(*g*) *Chapman v. Milvain*, 5 Ex. 61, removing the doubt expressed

directors for improper conduct, and for the purpose of compelling them to make good losses sustained by the company in consequence thereof (*h*). It is also settled that a shareholder may be convicted of embezzling the monies of such a company (*i*).

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The inability of a *firm* to sue one of its members, and *vice versa*, arises from the circumstance, that in an action by a firm against one of its members, or *vice versa*, the member in question must be both a plaintiff and a defendant. Practically it is often extremely inconvenient to have recourse to the intervention of a trustee, and to procure agreements to be made with him so as to enable him to sue and be sued thereon. But inconvenient as this is, it is only through the intervention of a trustee that agreements between partners and the firms to which they belong, can be so entered into as to be enforceable by action at law (*k*).

Legal proceedings between unincorporated and unprivileged companies and their members.

An agreement by each partner with his co-partners, may indeed be framed so as to enable one to be sued by the others, if care be taken to exclude the partner sued from all share in what is sought to be recovered from him, and to exclude the partner suing from all obligation to contribute to his own payment; but an agreement drawn so as to accomplish both these objects, is not generally convenient. Where, however, it is adapted to the requirements of the partners, it may safely be had recourse to, as is shown by the decision in the well known case of *Radenhurst v. Bates* (*l*). There several partners mutually covenanted with each other to do certain things, under certain penalties to be paid as liquidated damages to the plaintiff (one of the partners), who was to sue for the same; and it was declared that every penalty should be divided amongst all the partners except the partner by whom it should be payable, but that he should be excluded from all share in it himself. A partner having incurred a penalty,

Radenhurst v. Bates.

in *Hughes v. Thorpe*, 5 M. & W. 525. See 7 Geo. 4, c. 46, § 9, and 656. See, too, *Ex parte Hall*, 3 1 & 2 Vict. c. 96.
Deac. 405.

(*h*) *Harrison v. Brown*, 5 De G. & Sm. 728. Compare *Seddon v. Connell*, 10 Sim. 58.

(*k*) See *Bedford v. Brutton*, 1 Bing. N. C. 199, as to an action by a partner against the trustees of himself and co-partners.

(*i*) *R. v. Atkinson*, Car. & Marsh, (*l*) 3 Bing. 463.

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Stipulation that
secretary, &c.,
for time being
shall sue.

Action by purser
of cost-book
companies.

Hybart v.
Parker.

was sued for it by the plaintiff, and it was held that the action lay.

It is not, however, competent for partners to establish, even as amongst themselves, a rule that some officer, *e.g.*, the treasurer or secretary of the firm for the time being, shall, as it were, represent the firm and sue and be sued on its behalf accordingly. Consistently with the established law, effect cannot be given to such a rule, and it is simply nugatory. This was expressly decided in the case of *Hybart v. Parker* (*m*). There the defendant was a shareholder in a mining company formed on the cost-book principle. One of the rules of the company was that every shareholder should pay such calls as should be duly made upon him; that every call when made, should be considered a debt due to the *purser of the company*; that such purser should have power to recover the same by action at law as a debt due to him from every defaulter; and that no shareholder sued for a call, should be at liberty to set up or plead a partnership with the purser as a defence. A call was duly made, and the defendant not having paid his call, was sued by the purser; but it was held that the action was not maintainable, for it did not appear that there was any contract between the plaintiff and the defendant. The defendant's contract, if any, was with the purser for the time being; and a contract with a person who, for the time being, shall fill a certain office, is invalid in point of law, unless that person is a corporation sole, which he cannot be by the mere agreement of himself and others.

Putting a cre-
ditor on a share-
holder.

In consequence of the doctrine illustrated by this case, companies which are neither incorporated nor empowered to sue their own shareholders by public officers, frequently find it extremely difficult to compel the payment of money due to them from such shareholders by any direct proceeding against them. This difficulty has led to the crooked expedient of "putting a creditor on a shareholder;" that is to say, of compelling a shareholder to pay what he owes to the company by inducing some creditor of the company to single him out and sue him for the company's debt at the costs of the company. This

(*m*) 4 C. B. N. S. 209.

expedient is usually found to answer the purpose, inasmuch as the shareholder can only resist the creditor's action by pleading the non-joinder of the other shareholders in abatement; and this it is almost always impossible to do with effect. Rather therefore than allow the creditor to obtain judgment, the unfortunate shareholder makes terms with the directors. It is obvious that the grossest oppression may be exercised in this manner, and whatever may be said in defence of putting a creditor on an obstinate shareholder who will not pay, and cannot be otherwise made to pay, what he justly owes to the company, nothing can possibly be said in its favour in any other case: it is then disgraceful, and not less so to the creditor than to those at whose instigation he consents to abuse his rights. Fortunately, courts of equity will always interfere in such cases, and will both restrain proceedings by the creditor and compel those who "put him on," to deal fairly with the person sued. Whatever the rights of the creditor might be, if he were suing *bonâ fide* (n), he is not regarded in cases of the present description as having any greater rights than those whose tool he is (o). If the shareholder sued is entitled to have the accounts of the company taken, and to have its assets applied in payment of its debts, the Court will make a decree accordingly (p), if the necessary parties are before the Court (q). But a court of equity will only interfere to protect the shareholder on the terms of his doing what is just towards the company, and will, if there is reason to believe that he ought to pay what the company seeks to make him pay, require him to pay that sum into court (r).

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Interference of a
court of equity
in such a case.

The mere fact, moreover, that a shareholder in a company is

Winding up in
such a case.

(n) If he is so suing, the Court will not interfere, *Green v. Nixon*, 23 Beav. 530; *Beck v. Dean*, 3 Jur. N. S. 14, V.-C. Wood.

(o) See *Taylor v. Hughes*, 2 Jo. & Lat. 24; *Shortridge v. Bosanquet*, 16 Beav. 84, and *Bargate v. Shortridge*, 5 Ho. Lo. Ca. 297; *Horn v. Kilkenny, &c., Rail. Co.*, 1 K. & J. 399. See, also, *Woodhams v. Anglo-Australian Co.*, 2 De G. J. & Sm. 162.

(p) *Fernihough v. Leader*, 4 Ra. Ca. 373, and *Lewis v. Billing*, ib. 414.

(q) See *Sibley v. Minton*, 27 L. J. Ch. 53, V.-C. Kindersley.

(r) See *Cutts v. Riddell*, 1 De G. & S. 226; *Sibley v. Minton*, 27 L. J. Ch. 53. This last was the case of a cost-book mining company, a shareholder in which would not pay his calls.

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being sued by a creditor at the instance of the company, is not sufficient to induce a court of equity to make an order for winding up the company (s).

Having made these preliminary observations, it is proposed to consider the doctrines relating to actions at law between partners, to actions at law between companies and their members, and lastly, to those equitable remedies which are open to partners and shareholders against each other.

SECTION II.—ACTIONS AT LAW.

1. *Between persons who have agreed to become partners.*

Before entering into the question under what circumstances one partner may sue another at law, it is necessary to bear in mind the distinction between members of a partnership and persons who have only agreed to become partners.

Action on agreements for partnerships.

If a person agrees to become a partner, and he breaks his agreement, an action for damages will lie against him; and any premium he may have agreed to pay may be recovered (t); and it is no defence that the defendant has discovered that the plaintiff is a person with whom a partnership is undesirable (u). So, if a member of a firm agrees to introduce a stranger, an action lies at the suit of the latter against the former for a breach of this agreement, although it may have been made without the knowledge of the other members of the firm, and they may decline to recognise it (x).

Actions for deposits agreed to be paid.

Upon the same principle, if a person has agreed to take shares in a proposed company, and to pay a deposit in respect

(s) See *infra*, bk. iv. ch. 3, § 4, and *Ex parte Wyld*, 1 Mac. & G. 1; *Ex parte Lawton*, 1 K. & J. 204; *Ex parte Watson*, 3 De G. & S. 253; *Ex parte Wise*, 1 Drew. 465.

(t) *Walker v. Harris*, 1 Anst. 245; *Gale v. Leckie*, 2 Stark. 107. In *Figes v. Cutler*, 3 Stark. N. P. C. 139, it was held that an action for breach of an agreement to become a partner, could not be supported without proof of the terms

of the intended partnership. See, also, *Morrow v. Saunders*, 1 Brod. & Bing. 318. But see *McNeill v. Reid*, 9 Bing. 68.

(u) *Andrewes v. Garstin*, 10 C. B. N. S. 444, where the defendant pleaded that since the agreement was entered into he had discovered that the plaintiff had been guilty of fraud and dishonesty towards a former partner.

(x) *McNeill v. Reid*, 9 Bing. 68.

of such shares, an action for the recovery of the deposit he has agreed to pay will clearly lie (*y*). The persons to bring such action are those with whom the agreement sued upon was made. If, therefore, the agreement was with the members of the provisional committee, those members, and not the managing section of them, are the proper parties to sue (*z*).

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Again, where a person agrees to become a partner upon the performance of certain conditions precedent, which, without any fault of his, are not performed, he is entitled to recover back by action at law any monies he may have subscribed for the purposes of the partnership when formed. It is upon this principle that, as was seen in a previous chapter (*a*), subscribers to an abortive company are held entitled to recover back their subscriptions, if they have not assented to the employment of those subscriptions to any other than the purposes of the company when duly formed (*b*). Thus it has been held that a subscriber to a scheme for a tontine which is never in fact fairly started, is entitled to recover the whole amount of his subscription, although expenses have been incurred in attempting to start it (*c*); also, that a subscriber to a scheme for making a railway is entitled to recover his money back by an action at law if the scheme proves a failure (*d*); and that he is so entitled, although shares may have been allotted to him (*e*), and although he may have signed an agreement authorising the application of his deposits to preliminary expenses, if he was induced to enter into that agreement by fraud (*f*); or if, notwithstanding that agreement, the return of his deposit has been expressly guaranteed (*g*). So it has been held that the subscriber to a cost-book mining company is entitled to

Actions for the
recovery back of
deposits.

(*y*) See for instances, *Duke v. Dive*, 1 Ex. 36; *Duke v. Forbes*, ib. 356.

(*z*) *Woolmer v. Toby*, 10 Q. B. 691.

(*a*) *Ante*, 120, *et seq.*

(*b*) See as to this qualification, *Garwood v. Ede*, 1 Ex. 264, and cases of that class noticed *ante*, pp. 124, *et seq.*

(*c*) *Nockels v. Crosby*, 3 B. & C.

814, and *ante*, p. 121.

(*d*) *Walstab v. Spottiswoode*, 15 M. & W. 501; and *ante*, p. 122.

(*e*) *Walstab v. Spottiswoode*, 15 M. & W. 501.

(*f*) *Wontner v. Shairp*, 4 C. B. 404, *ante*, p. 125.

(*g*) *Mowatt v. Lord Londesborough*, 3 E. & B. 307, and 4 ib. 1, *ante*, p. 125.

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Sect. 2.

recover his money back if it is clear that it cannot be formed as intended when he subscribed to it (*h*). In the case in which this was decided the company had actually begun to work the mine, but the plaintiff had not sanctioned that proceeding, and it was no part of his bargain that he should be considered a partner in a concern, the capital of which was less than that fixed when he agreed to join it.

Defendants in
such actions.

The persons to be sued for the recovery back of deposits paid are those who received such deposits by themselves or their agents (*i*). A denial by them that they received the money amounts to the general issue, and should not, therefore, be pleaded specially; and the same observation applies to a defence on the ground that the money is, or was, properly applicable to purposes for which it is, or has been wanted, and that, consequently, it is not returnable (*k*). In order that the plaintiff may prove that the consideration for which he paid his money has failed, he must show what that consideration was (*l*).

Observations on
abortive schemes.

In the class of cases to which reference has just been made, it is to be observed that, *ex hypothesi*, no partnership has commenced between the plaintiff and the persons whom he sues for his money. The question, Can a subscriber to an abortive scheme recover his money back? is, therefore, totally different from that put by Holroyd, J., in *Nockels v. Crosby* (*m*), when he asked whether, if five persons *enter into partnership*, and contribute 1000*l.* each, and they afterwards find the concern a losing one, and put an end to it, any one of them can maintain an action against the others for his share? Whilst this latter question must be answered in the negative (*n*), the former may properly be answered in the affirmative, as, in fact, it has been in the cases already referred to.

Actions for mis-
representation.

Where a person has been induced by the false and fraudulent

(*h*) *Johnson v. Goslett*, 18 C. B. 728; 3 C. B. N. S. 569.

115; *Coupland v. Challis*, 2 Ex. 682.

(*i*) See *ante*, p. 126; and see *Wells v. Ross*, 7 Taunt. 403, as to the receipt of one partner being the receipt of both.

(*l*) See *ante*, p. 121.

(*m*) 3 B. & C. 819.

(*n*) See *per* Pollock, C. B., in *Garwood v. Ede*, 1 Ex. 267.

(*k*) See *Owen v. Challis*, 6 C. B.

representations of another to enter into partnership with him, an action will clearly lie at the suit of the first person against the second for the recovery of damages in respect of such fraud (o). And if false representations are made by means of advertisements issued for the purpose of inducing persons to take shares in a company, any person who is ensnared by those advertisements, and takes shares on the faith of them, may maintain an action against those persons who caused them to be published, knowing them to be false (p). In order to maintain an action for misrepresentation, it is not necessary that there should have been any direct communication between the defendant and the plaintiff (q).

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Persons engaged in forming a company of which they are to be members are not impliedly liable to make each other compensation for their respective services in forming the company; for although such persons are not partners, they are all engaged in the prosecution of a common design; and each, *primâ facie*, is to be taken as looking for remuneration to what he will get if his efforts prove successful (r). But a person who is retained by the promoters to assist them, is entitled to be paid by them for his services, although he may afterwards himself subscribe for shares in the company (s).

Actions between
promoters of
companies.

However, in *Gorgier v. Morris* (t), an agreement between the promoters of a company and the plaintiff, to the effect that the plaintiff should have a large sum in free shares of the company, in consideration of his past and anticipated future

Gorgier v. Morris.

(o) See the cases in the next two notes, and *Dobell v. Stevens*, 3 B. & C. 623.

(p) *Davidson v. Tulloch*, 3 McQu. 783; *Cullen v. Thompson*, 4 ib. 424; *Bale v. Cleland*, 4 Fos. & Fin. 117; *Gerhard v. Bates*, 2 E. & B. 476; and see *Denton v. The Great North. Rail. Co.*, 5 E. & B. 860; *Watson v. Charlemont*, 12 Q. B. 856. See, as to an indictment for conspiracy, *R. v. Timothy*, 1 Fos. & Fin. 39, and for obtaining money under false pretences, *R. v. Watson*, 4 Jur. N. S. 14; and see 24 & 25

Vict. c. 96, §§ 82—85, noticed *ante*, pp. 797, 798.

(q) See *Clarke v. Dickson*, 6 C. B. N. S. 453; and see *Bedford v. Bagshaw*, 4 H. & N. 538.

(r) See *Holmes v. Higgins*, 1 B. & C. 74; *Wilson v. Curzon*, 15 M. & W. 532; *Milburn v. Codd*, 7 B. & C. 419.

(s) *Lucas v. Beach*, 1 Man. & Gr. 417. See, too, *Caldicott v. Griffiths*, 8 Ex. 898; and *Bartlett v. Lambert*, 10 Jur. 416.

(t) 7 C. B. N. S. 588.

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Sect. 2.

Company re-
quired to pay
expenses of
formation.

Contribution be-
tween them.

Boulter v.
Peplow.

services in promoting the interests of the company, was held to amount merely to a promise to make the plaintiff a present, and to be invalid for want of a consideration. The company was never formed, and no shares were ever issued.

Where a company is required by act of Parliament to apply its first funds in defraying the expenses of its formation, an action lies against it by those who have expended their money, time, and trouble, in forming the company, although they may themselves be members thereof (*u*).

But although the promoters of companies are not impliedly liable to each other for services rendered, nor for money expended by any of them in the prosecution of their common design; still, if they render themselves jointly liable to a third party, and, by virtue of that liability, some only of them are compelled to pay what ought, as between themselves and the others, to be paid by all, an action for contribution lies, at the suit of those who have been so compelled to pay, against the others; and it is no objection to such an action that there are unsettled accounts which require to be taken, before what is due from each to the other can be properly ascertained. The leading cases on this head are *Boulter v. Peplow* and *Batard v. Hawes*.

In *Boulter v. Peplow* (*x*) three provisional committee-men hired rooms for the purposes of a projected company. The company was ultimately formed, and it paid the rent for some little time. It afterwards ceased so to do, and an action was then brought by the landlord against the three committee-men in question, two of whom let judgment go by default. A verdict was obtained against the third, who was compelled to pay the amount of damages and costs. In order to recover contribution, he brought an action for one-third of what he had paid against each of his two co-committee-men; and it was held that such action lay, although at the time it was brought

(*u*) See *Carden v. General Cemetery Co.*, 5 Bing. N. C. 253; *Tilson v. Warwick Gas Co.*, 4 B. & C. 962; *Clowes v. Brettell*, 10 M. & W. 506; *Hitchins v. Kilkenny, &c.*,

Rail. Co., 9 C. B. 536. See, also, *Wyatt v. Metrop. Board of Works*, 11 C. B. N. S. 744, as to who can sue in such cases.

(*x*) 9 C. B. 493.

the plaintiff and the defendants were members of the company for the use of which the rooms had been hired.

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In *Batard v. Hawes* and *Batard v. Douglas* (y), the promoters of a projected company engaged the services of an engineer, and became liable to him to a considerable amount, to obtain payment of which he sued one of them. This one having been compelled to pay the engineer's demand, brought actions against his co-promoters for contribution; and he was held entitled to recover, although it was objected that there were unsettled cross claims between him and the other promoters, and that, on that account, no contribution could be obtained at law. This objection was over-ruled on the ground that the promoters were not partners (z).

Batard v. Hawes.

Edger v. Knapp (a) is another case of the same kind, the person retained having been a solicitor, instead of an engineer.

Edger v. Knapp.

2. Actions between partners.

Passing now to the subject of actions between persons who are partners in the full and proper sense of the word, it is proposed to inquire under what circumstances an action by one against the other will lie, and under what circumstances it will not. With reference to this inquiry it will be found useful to keep constantly in mind these questions, viz. First, is any matter of account involved in the dispute to which the action relates? Secondly, will the damages sought to be obtained, belong, if obtained, to the firm? Thirdly, will such damages have to be paid out of a fund to which the plaintiff must himself contribute? If these three questions can be answered in the negative, *i.e.*, if the action can be properly tried and decided wholly irrespectively of the state of the accounts between the parties, and if the damages sought will, when

Actions between partners.

(y) 2 E. & B. 287.

(z) See *Helme v. Smith*, 7 Bing. 709, which shows that the rule alluded to does not apply to co-owners of ships.

(a) 7 Jur. 583, C. P. It may be observed here, that where the promoters of a company retain a soli-

citor, they are all liable to be sued by him for payment of his bill, and that a delivery by him of his bill, duly signed, to any one of those liable, is a sufficient delivery to all, *Mant v. Smith*, 4 H. & N. 324; and that any one of them is entitled to tax his bill, *Re Stephen*, 2 Ph. 562.

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recovered, belong not to the firm (including the defendant to the action), but exclusively to the plaintiff, and if he will not have to contribute to his own payment, then an action will lie, notwithstanding the parties to it are partners, and the matter relates to some partnership transaction. But if all the above questions cannot be answered in the negative, an action at law is not the proper remedy, except under the special circumstances mentioned in the sixth rule to be presently noticed (*b*).

Each of these propositions requires to be examined in detail.

When an action will lie.

Ejectment by one
partner against
another.

First, as regards real property. In actions of ejectment and of trespass, courts of law pay no attention to anything except the strict legal right of the plaintiff and of the defendant to the property in question in the action. All collateral matters are disregarded; and in an action of ejectment a plea on equitable grounds is not allowed (*c*). Hence, if a firm is in the occupation of land, the legal estate in which is in one of the partners only, he can at law eject his co-partners (*d*); and if the firm has been dissolved no notice to quit need be given, before ejectment (*e*), or trespass (*f*), is brought against them. The equitable doctrine that a partnership, although dissolved, subsists for the purpose of winding up its affairs, affords no defence at law to such an action (*g*). If the legal estate is in all the partners, and one partner actually excludes the others from the land legally belonging to all, ejectment will lie (*h*);

(*b*) No instance of an action of account brought by one partner against another, is known to the writer. The action of account is almost obsolete, although there have been a few instances of it in modern times between tenants in common of real property. See *Baxter v. Hozier*, 5 Bing. N. C. 288; *Sturton v. Richardson*, 13 M. & W. 17; *Beer v. Beer*, 12 C. B. 60; *Henderson v. Eason*, 17 Q. B. 701; reversing *Eason v. Henderson*,

12 ib. 986.

(*c*) *Neave v. Avery*, 16 C. B. 328.

(*d*) *Francis v. Doe*, 4 M. & W. 331; *Smith v. Howth*, 10 Ir. Com. Law Rep. 125.

(*e*) *Doe v. Bluck*, 8 C. & P. 464.

(*f*) *Benham v. Gray*, 5 C. B. 138.

(*g*) See the last case.

(*h*) See *Peaceable v. Read*, 1 East, 568; *Doe v. Horn*, 3 M. & W. 333, and 5 ib. 564.

and if one utterly destroys the common property, an action for damages may be sustained (*i*); but for injuries not amounting to the utter exclusion by one partner of the others, an action it seems will not lie (*k*).

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Secondly, as regards personal property. If one of several joint tenants, or tenants in common, is in exclusive possession of the common property, he has a right so to continue if he can, and no action against him will lie at the suit of his co-tenant (*l*). But if one tenant in common or joint-tenant destroys (*m*), or as it seems sells (*n*) the common property, he may be sued at law by his co-tenant. In the case of a sale, however, the purchaser cannot be made to restore the property, for he at all events acquires the interest of the vendor, and becomes therefore tenant in common with the other owners, and cannot be sued by them at law (*o*).

Trover by one partner against another.

If, on a dissolution of partnership, the partnership property has been divided in specie amongst the partners, each may recover what has been allotted to him, for as to that he has become sole owner (*p*); and if the dissolution and the division of the property are made by deed, each partner will be precluded from denying that any division has in fact been made, or that the previously existing tenancy in common has not been determined, and each therefore will be entitled to recover what is in the deed declared to be his (*q*).

Trover after division of property.

Thirdly, an action for damages for the breach of an express agreement entered into by one partner with another will lie, if the damages when recovered will belong to the plaintiff alone. Thus where a partner retires, and he covenants with his co-partners not to carry on business within certain limits, or they

Action for breach of express contract by one partner against another.

(*i*) See *Cubitt v. Porter*, 8 B. & C. 257; *Stedman v. Smith*, 8 E. & B. 1.

P. 34-5; 2 Wms. Saund. 47, o.

(*k*) But see *Martyn v. Knowllys*, 8 T. R. 146; *Stedman v. Smith*, 8 E. & B. 1.

(*n*) *Mayhew v. Herrick*, 7 C. B. 247; *Barton v. Williams*, 5 B. & A. 395; *Williams v. Barton*, 3 Bing. 139.

(*l*) See 2 Wms. Saund. 47, o.; *Foster v. Crabbe*, 12 C. B. 136; *Holliday v. Camsell*, 1 T. R. 658; *Fennings v. Grenville*, 1 Taunt. 241.

(*o*) *Fox v. Hanbury*, Cowp. 445, and other cases of that class.

(*m*) *Barnardiston v. Chapman*, cited in 4 East, 121, and Bull. N.

(*p*) See *Jackson v. Stopherd*, 2 Cr. & M. 361; and *Wiles v. Woodward*, 5 Ex. 557.

(*q*) Ibid.

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covenant to indemnify him against the debts of the firm; actions for damages occasioned by breaches of these covenants will clearly lie (*r*). So, if a partnership is entered into for a definite time, and one partner is turned out by his co-partners before that time has expired, he can sue them for this breach by them of their agreement, and recover damages for the injury he has sustained (*s*); and generally an action may be brought for damages sustained by any breach of an express stipulation by one partner with his co-partners, if it is so framed as to admit of an action by some or one only of the partners against the partner complained of, and the damages will when recovered not belong as much to himself as to the plaintiffs—*e. g.*, an action may be maintained for not rendering accounts and dividing profits (*t*); for a penalty stipulated to be paid in case of a breach of agreement (*u*); for rent covenanted to be paid (*x*); for not indemnifying the plaintiff against a debt (*y*); for not putting the plaintiff in funds to enable him to defray expenses as agreed (*z*).

Action for not
furnishing
capital.

Fourthly, if a person agrees to become a partner with others and to furnish a certain amount of capital, and he makes default, they can sue him at law for damages, although he as well as they were to have had an interest in what he undertook to furnish.

Venning v.
Leckie.

A leading authority on this head is *Venning v. Leckie* (*a*). There the plaintiff and the defendant agreed to embark in a speculation in flax. The plaintiff had bought the flax, and the defendant promised to furnish him with half its price in time for payment. The plaintiff having paid for the flax, sued the defendant for one-half of the price paid, and he recovered,

(*r*) *Leighton v. Wales*, 3 M. & W. 545; *White v. Ansdell*, Tyr. & Gr. 785. *Barker v. Allan*, 5 H. & N. 61, is an instance of a successful action by a shareholder against directors who had agreed to indemnify him against calls. See, too, *Haddon v. Ayres*, 1 E. & E. 118.

(*s*) See *Greenham v. Gray*, 4 Ir. Com. Law. Rep. 501.

(*t*) *Owston v. Ogle*, 13 East, 538;

and see *Stavers v. Curling*, 3 Bing. N. C. 355.

(*u*) *Radenhurst v. Bates*, 3 Bing. 463.

(*x*) *Bedford v. Brutton*, 1 Bing. N. C. 399.

(*y*) *Want v. Reece*, 1 Bing. 18.

(*z*) *Brown v. Tapscott*, 6 M. & W. 119.

(*a*) 13 East, 7.

although it was objected that the defendant was entitled to, and had not received an account of the subsequent sales. It was answered that the purchase of the flax was to launch the partnership, and that no questions of account arose until after the defendant had furnished his share of the price.

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So, in *Gale v. Leckie* (b), where an agreement was entered into between an author and a publisher to the effect that the former should write a book and the latter publish it, and that the profits arising from its sale should be divided, it was held that an action lay by the publisher against the author for not furnishing the manuscript of the book.

Gale v. Leckie.

The well-known case of *Hesketh v. Blanchard* (c) affords another illustration of the principle in question. There Robertson, who was captain of a ship about to sail to Africa, having no credit or ready money, requested the plaintiff to go with him to a butcher's and order meat, to be taken on the voyage. Robertson promised the plaintiff that, "if any profit should arise from the meat, the plaintiff should have one-half for his trouble." The plaintiff and Robertson went to the butcher's and ordered the meat, and both were debited by the butcher with the price; and the butcher swore that he would not have trusted Robertson alone. The meat was delivered to Robertson, who sailed, and died, without having come to any account with the plaintiff. The plaintiff paid the butcher the whole price, and sought to recover the *whole amount so paid* from the defendants, the executors of Robertson. The plaintiff had a verdict for the whole amount; subject to the opinion of the Court whether he was entitled to recover the whole, or half, or nothing; and, if nothing, a nonsuit was to be entered. A rule *nisi* for entering a nonsuit was obtained, and discharged; so that, in fact, the plaintiff recovered the whole amount paid by him for the meat.

Hesketh v. Blanchard.

This case has given rise to much controversy (d); not, indeed, with reference to the question decided, but with reference to an opinion expressed by Lord Ellenborough, that no partnership existed between Robertson and the plaintiff,

Observations
on *Hesketh v. Blanchard.*

(b) 2 Stark. 107.

(c) 4 East, 144.

(d) See in *Stocker v. Brocklebank*,

3 Mac. & G. 265; *Rawlinson v. Clarke*, 15 M. & W. 298; Collyer on Part. p. 60.

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except as regards third parties. Having regard to the decisions relating to partnerships in profits, it is difficult to assent to this opinion; but the case is, it is conceived, unimpeachable as regards the point before the Court, viz., the right of the plaintiff, whether partner or not with Robertson, to recover the price of the meat for which the plaintiff had been compelled to pay.

Loan by one
partner of sum
to be brought in
by the other.

It follows from the principle on which *Venning v. Leckie* and *Hesketh v. Blanchard* were decided, that if A. and B. agree to become partners, and each agrees to furnish a certain amount of capital, and A. lends B. the amount B. is to contribute, this loan constitutes a debt for which an action by A. against B. will lie, although they may actually have become partners (*e*). And it also follows that, if partners agree to contribute capital from time to time to meet expenses, as occasion may require, and one of them is compelled to pay the whole of the expenses for which all are liable, he can sue his co-partners for what they ought to have contributed, according to their agreement (*f*). In *Brown v. Tapscott*, several persons agreed to share the profits arising from running a steamer between London and Ramsgate. One of them was to charter and have the management of the boat, and each agreed to pay 10% per cent. on the amount of his subscription, and such further instalments, in proportion to their respective subscriptions, as might be necessary, if the earnings of the boat were not sufficient to defray her expenses—which, in fact, they were not. The partner to whom the management of the boat was entrusted paid all the expenses incurred by running her, and sued one of his co-partners for the share which he ought to have contributed towards defraying such expenses. The plaintiff obtained a verdict, and the Court refused to disturb it, although the Court was of opinion that the plaintiff and the defendant were partners; for it considered that an action would clearly lie on the promise by the defendant to contribute to a common fund for defraying the expenses of the boat.

Action for not
contributing to
expenses.

Brown v. Tap-
scott.

(*e*) *Elgie v. Webster*, 5 M. & W. 518; *Ex parte Notley*, 1 Mon. & Ayr. 46, and 3 D. & Ch. 367. See (*f*) *Brown v. Tapscott*, 6 M. & W. 119.

French v. Styring (g) was decided on the same principle, and goes even further than the case just referred to. In *French v. Styring* the plaintiff and the defendant were owners of a race-horse, and they agreed that the plaintiff should have the care and training and management of the horse; that thirty-five shillings a week should be allowed for the horse's keep; that the plaintiff should pay the expenses of entering the horse and conveying him to the different races; and that the horse's expenses and winnings should be shared equally by the plaintiff and the defendant. The horse never won anything, and was sold; and the plaintiff then sued the defendant for one-half of the expenses incurred about the horse, and paid by the plaintiff. Upon the question whether the plaintiff and the defendant were partners the Court was divided, but it was unanimous in holding that the plaintiff was entitled to recover in the action, on the ground that the defendant had undertaken in effect to subscribe to the keep of the horse, and had not done so. The case was likened to one in which a partner agrees to bring in capital and does not, in which case an action lies, as is shown by the decisions already noticed.

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French v. Styring.

Fifthly.—One partner may sue another at law in respect of a demand which has either nothing to do with the partnership business, or, if entangled in it, is only so entangled by reason of the wrongful conduct of the defendant.

Action by one partner against another for matters unconnected with the partnership accounts;

The first branch of this rule requires no comment. The second is illustrated by *Smith v. Barrow* (h) and *Cross v. Cheshire* (i). In the former of these cases it was held, that one partner who had received money to the use of another might be sued for it, although he had paid it to the credit of the firm; for his business was to hand it over to his co-partner. In the latter case it was held, that a partner who, in fraud of his co-partners, had given a note in the name of the firm for a private debt of his own, whereby his co-partners had been compelled to pay such note, was liable to them at law for the whole of what they had been compelled to pay (k).

(g) 2 C. B. N. S. 357.

(h) 2 T. R. 476.

(i) 7 Ex. 43.

(k) *Cross v. Cheshire*, 7 Ex. 43;
Osborne v. Harper, 5 East, 225.

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and for matters
not involving
them;

Action for
amount of
valuation;

for balance
struck;

Sixthly.—One partner may sue another at law in respect of a matter which, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can and ought to be determined without going into the partnership accounts. Thus where a partnership has been dissolved, and it has been agreed that one partner shall take all the partnership property at a valuation, and it has been valued, and he has taken it at that valuation, and the values of the shares of the other partners have been ascertained, they may separately sue him at law for the amount payable to them respectively (*l*). So, if partners go through the accounts of the partnership, and a final balance is struck, and the amounts of their shares are ascertained, and the person by whom those amounts are to be paid is also ascertained, an action will lie against him in respect of each share to be paid by him (*m*). The balance, however, must be a final balance to be paid, and not a balance to be carried over to a fresh account in continuation of that just closed. Therefore, where one partner sued another for a debt unconnected with the partnership, the defendant was not allowed to set off a balance found due to him on the partnership account; for it did not appear that the account which had been stated was a final account, nor that the plaintiff had ever promised to pay the balance which, on taking the account, was found due to the defendant (*n*). In this last case it will be observed the partnership continued after the balance sued for was struck; but it is apprehended that if a balance is struck, and is to be paid by one partner to the other, it might be sued for, notwithstanding the continuance of the partnership; for, *ex hypothesi*, it is isolated and separated from the general account (*o*).

(*l*) See *Jackson v. Stopherd*, 2 Cr. & M. 361.

(*m*) *Morley v. Baker*, 3 Fos. & Fin. 146; *Moravia v. Levy*, 2 T. R. 483, note; *Foster v. Allanson*, 2 T. R. 479; *Wray v. Milestone*, 5 M. & W. 21; *Brierly v. Cripps*, 7 C. & P. 709; *Preston v. Strutton*, 1 Anst. 50; *Henley v. Sloper*, 8 B. & C. 16; *Rackstraw v. Imber*, Holt,

368; *Wells v. Wells*, 1 Ventr. 40.

(*n*) *Fremont v. Coupland*, 2 Bing. 170. See, too, *Lyon v. Haynes*, 5 Man. & Gr. 504, where the sum ascertained to be payable was subject to contingent claims.

(*o*) This point was raised, but not decided, in *Carr v. Smith*, 5 Q. B. 128, where the action failed, because the account sued on had been

Again, if one partner gives to his co-partner a bill or note which is not in such a form as to bind the firm, but is binding on the partner who gives it, he may be sued by his co-partner thereon, whatever the state of the accounts between the two may be, and although the bill or note in question had reference to some partnership transaction; for by giving the bill or note, the demand in respect of which it is given is isolated from the general partnership account (*p*). An I O. U. is evidence of an account stated, and may be sued upon by one partner against another accordingly (*q*).

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on bill or note ;

Upon precisely the same principle, if a partner leases property to trustees for the firm, and those trustees covenant to pay the rent, he may sue them on that covenant, although he may, as one of the firm, be bound to indemnify the trustees against all losses sustained by them in that character, and the trustees may themselves be members of the firm; for the covenant to pay the rent constitutes a demand distinct from all others (*r*).

action for rent ;

Again, if one partner receives money for the use of the firm in respect of some transaction separate and distinct from its other business, and the money thus received ought to be divided without reference to other matters, his co-partners may, it is conceived, sue him at law for their shares of the money in question (*s*).

for money received to plaintiff's use ;

So, if one partner pays money of his own to his co-partner, in order that it may be applied by him for some specified partnership purpose, and it is received for that purpose and no other, and is misapplied, an action lies for the recovery of such money; for, *ex hypothesi*, it never was the money

or money placed in defendant's hands for a particular purpose ;

made out by a non-partner, and had not been assented to by the partners, and was not stamped as an award.

475, Ex.

(*r*) *Bedford v. Brutton*, 1 Bing. N. C. 399.

(*p*) See *Beecham v. Smith*, E. B. & E. 442; *Neale v. Turton*, 4 Bing. 151; *Preston v. Strutton*, 1 Anst. 50; *Fox v. Frith*, 10 M. & W. 131, and *Heywood v. Watson*, 4 Bing. 496. Compare *Tibaldi v. Ellerman*, 6 Dowl. & L. 71.

(*s*) See *Graham v. Robertson*, 2 T. R. 282. In *Ex parte Dodgson*, Mon. & Mac. Ar. 445, it was held that one of two sub-partners might prove against the other's estate for half of the profits received by him in respect of his share in the principal firm. Compare *Bovill v. Hammond*, 6 B. & C. 149.

(*q*) *Graves v. Cook*, 2 Jur. N. S.

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Actions for
money paid
under mistake
as to accounts ;

on agreement to
indemnify ;

for contribution
in respect of a
particular loss ;

Sedgwick v.
Daniell ;

of the firm, and the duty of the partner who received that money was either to apply it as agreed, or to return it intact (*t*).

In *Townsend v. Crowdy* (*u*), an outgoing partner sold his share for a sum of money, which the purchaser was to pay at the end of three years, subject to a deduction in the event of his share of the profits for those years not amounting to a given sum. The purchaser paid the purchase-money in the belief that his share of the profits would reach the fixed amount. In this, however, he ultimately found he was mistaken. He was held entitled to recover the amount which he had overpaid in ignorance of the real state of the accounts.

Again, if, in respect of some particular transaction, one partner has expressly agreed to indemnify another, and has not done so, an action may be brought by the latter against the former, inasmuch as the right to be indemnified has, by agreement, been made independent of all other questions between the partners (*x*). Therefore, where one partner in his own name accepted a bill for a partnership debt, on the faith of a promise by one of the other partners that he would provide funds to pay the bill, and the acceptor was nevertheless compelled to pay it, he was held entitled to recover the whole amount from the other partner (*y*).

Further, if some of a number of partners give their promissory note for better securing payment of a debt owing by them and their co-partners, and one of the makers of the note is compelled to pay the whole amount of it, he is entitled to sue each of the other makers of the note for his proportion of the sum so paid. For, in the case supposed, the right to contribution arises in respect of a matter not involved in the general account, and does not depend upon the circumstance that the makers of the note are partners. This was decided by the Court of Exchequer in *Sedgwick v. Daniell* (*z*). There three shareholders of a joint-stock mining company gave a joint

(*t*) See *Wright v. Hunter*, 1 East, 436 ; *Brown v. Tapscott*, 6 M. & W. 119.

(*u*) 8 C. B. N. S. 477.

(*y*) *Coffee v. Brian*, 3 Bing. 54.

(*x*) *Coffee v. Brian*, 3 Bing. 54 ;
see, too, *Wilson v. Cutting*, 10 Bing.

(*z*) 2 H. & N. 319.

and several promissory note as a security for a loan to the company. One of the makers of the note was compelled to pay the whole of its amount, and he then brought an action against one of the other makers to recover one-third of the sum so paid, and it was held that he was entitled to recover. The Court laid stress upon the circumstance that some only of the partners made the note, as showing that the transaction was separate and apart from the ordinary partnership business.

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These cases naturally suggest the important question whether one partner who has been compelled to pay the whole of a partnership debt is not always entitled to consider his right to be indemnified by his co-partners, in respect of that payment, as independent of all other questions, and to sue them at law for contribution accordingly. There is no doubt, as a general proposition, that where one of several joint debtors has been compelled to pay the whole debt, he can sue the others at law for the proportions which they ought to have paid (a); and there does not seem to be any sufficient reason why this rule should not apply as much to partners as to non-partners; for there is no more difficulty in regarding the cause of action as distinct from the general partnership accounts than there was in some of the cases above referred to.

for contribution
when one has
paid more than
his share of a
debt of the firm.

In *Sadler v. Nixon* (b), however, it was decided, that if one of several partners has been compelled to pay a debt of the firm, he cannot obtain contribution from his co-partners by action at law. The facts there were as follows: three partners were indebted to a builder for repairs done to their place of business. He brought an action against all the partners, but took the plaintiff only in execution. The plaintiff, to regain his liberty, paid the whole debt, and sued the defendant, who was one of his co-partners, for one-third of the amount so paid.

Sadler v. Nixon.

(a) See *Burnell v. Minot*, 4 Moo. 340; *Boulter v. Peplow*, 9 C. B. 493; *Batard v. Hawes*, 2 E. & B. 287; *Helme v. Smith*, 7 Bing. 709. and compare *Wooley v. Batte*, 2 C. & P. 417; *Osborne v. Harper*, 1

(b) 5 B. & Ad. 936. See, too, *Smith*, 411.
Batard v. Hawes, 2 E. & B. 287;

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Observations on
last case.

The case was tried before Lord Denman, who nonsuited the plaintiff; and the Court refused to set aside the nonsuit, inasmuch as, with reference to the question of contribution between partners, no distinction could be drawn between voluntary and compulsory payments.

It is difficult to reconcile this case with those in which it has been held, that if one of several projectors of a company is compelled to pay a debt owing by them all, he can obtain contribution from them by an action at law, although there may be unsettled accounts between him and them (*c*). It is true, that the promoters of a company are not partners; but, it is submitted that this is not material; for the objection to an action by one partner against another is not that the parties are partners (*d*), but that one is suing the other in respect of some matter involving a question of account, or that the defendant is asked to make some payment to himself as well as to the plaintiff. It is also worthy of remark, that before it was settled, as it now is, that promoters of companies are not partners, an action by one against the others under the circumstances supposed, was held to lie, on the ground that the right to contribution was independent of other matters, and entirely collateral to the partnership (*e*). This point was not called to the attention of the Court in *Sadler v. Nixon*.

When an action will not lie.

General rule that
one partner can-
not sue another
at law ;

in respect of any
matter involving
the partnership
account.

It is clear from the cases referred to in the last few pages, that there is no such rule as that one partner cannot sue another at law, in respect of a debt arising out of a partnership transaction, and that this circumstance alone affords no reason why an action should not be brought by one partner against another (*f*). Except, however, in an action of account, which is almost obsolete, it is a general rule that between partners,

(*c*) *Batard v. Hawes*, 2 E. & B. 287 ; *Boulter v. Peplow*, 9 C. B. 493.

(*d*) See *Worrall v. Grayson*, 1 M. & W. 166.

(*e*) See *Boulter v. Peplow*, 9 C. B. 493 ; and *Sedgwick v. Daniell*, 2 H. & N. 319.

(*f*) See *Worrall v. Grayson*, 1 M. & W. 166.

whether they are so in general or for a particular transaction only, no account can be taken at law (*g*); nor (except in an action of account) can one partner sue another at law, unless the cause of action is so distinct from the partnership accounts as not to involve their consideration (*h*); nor unless the plaintiff if he recovers will be justified in keeping what he may get without afterwards having to account to his co-partners for any part of it (*i*). Hence one partner cannot sue another at law for work and labour done for the firm, and therefore on account as well of the plaintiff as of the defendant (*k*); nor for money had and received for the firm, for it must be properly shared between the parties to the action (*l*); nor for money paid to the use of the defendant, if the question whether he ought to repay it or not turns on the state of the partnership accounts (*m*); nor for money lent to the firm of which the plaintiff is himself a member, for the advance only forms an item in the partnership account (*n*); nor on a bill or note drawn, accepted, or endorsed in such a manner as to bind the firm jointly and not its members severally also, for in such a case not only must the plaintiff as one of the firm contribute to payment of the instrument, but he ought also to be a defendant to the action (*o*). For similar reasons, if partners become indebted to a third person who dies, and appoints one of them his executor, this one cannot even as executor sue his co-

(*g*) *Bovill v. Hammond*, 6 B. & C. 151; and see *Scott v. McIntosh*, 2 Camp. 238.

(*h*) *Ibid.*; and see the cases in the six following notes. This rule has been held to prevent the *cestui que trust* of a partner from suing the other partners. See *Goddart v. Hodges*, 1 Cr. & M. 33. *Sed quære.*

(*i*) *Milburn v. Codd*, 7 B. & C. 421; *Bedford v. Brutton*, 1 Bing. N. C. 405; *Caldicott v. Griffiths*, 8 Ex. 898.

(*k*) *Goddart v. Hodges*, 1 Cr. & M. 33; *Holmes v. Higgins*, 1 B. & C. 74; *Milburn v. Codd*, 7 B. & C. 419; *Lucas v. Beach*, 1 Man. & Gr. 417.

(*l*) *Bovill v. Hammond*, 6 B. & C. 149; *Smith v. Barrow*, 2 T. R. 476; *Fromont v. Coupland*, 2 Bing. 170. See, too, *Lewis v. Edwards*, 7 M. & W. 300; *Thomas v. Thomas*, 5 Ex. 28.

(*m*) *Robson v. Curtis*, 1 Stark. 78. But see *Townsend v. Crowdy*, 8 C. B. N. S. 477, noticed *ante*, p. 876.

(*n*) *Perring v. Hone*, 4 Bing. 28; *Colley v. Smith*, 2 Moo. & Rob. 96.

(*o*) See *Neale v. Turton*, 4 Bing. 149; *Mainwaring v. Newman*, 2 Bos. & P. 120; *Teague v. Hubbard*, 8 B. & C. 345, and 2 Man. & Ry. 369; *Tibaldi v. Ellerman*, 6 Dowl. & L. 71.

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Actions for re-
covery of part-
nership goods,
&c.

Actions for im-
proper sale.

Mayhew v.
Herrick.

Barton v. Wil-
liams.

partners for the debt due to the deceased (*p*); and if there are two firms with a partner common to both, one firm cannot sue the other at law (*q*); neither is there any mode by which at law one partner can sue the *firm* or be sued by it (*r*). But upon a joint and several promissory note, a partner may be sued by his co-partners or by a firm of which they are members (*s*).

Again, as one tenant in common of personalty cannot sue his co-tenant for the recovery of that property, it follows that one partner cannot, by action at law, obtain from his co-partner property of the firm wrongfully detained by him (*t*).

It does not, however, seem so clear that if one partner wrongfully sells property of the firm, his co-partner cannot sue him at law, either for the wrongful conversion or for a share of the produce of the sale. For although the older decisions seem to be opposed to any such right (*u*), it was held in the recent case of *Mayhew v. Herrick* (*x*) that a sheriff who, under a *fi. fa.* against one partner, sold goods of the firm, was answerable at law to the assignees of the other partner for one-half of the proceeds of the sale; and it was previously held, in *Barton v. Williams* (*y*), that a sale by one tenant in common of the common property gave the other a right to sue him at law for a wrongful conversion (*z*). The question, therefore, whether if one partner wrongfully sells the goods of the firm, he can or cannot be sued at law by his co-partners, seems to turn on whether

(*p*) *Moffat v. Van Millingen*, cited 2 Bos. & P. 124.

(*q*) *Perring v. Hone*, 2 Car. & P. 401, and 4 Bing. 28; *Mainwaring v. Newman*, 2 Bos. & P. 120; *Bosanquet v. Wray*, 6 Taunt. 597; *Jacaud v. French*, 12 East, 317.

(*r*) See, in addition to the cases cited in the last note, *De Tastet v. Shaw*, 1 B. & A. 664, and *Richardson v. The Bank of England*, 4 M. & Cr. 171, 172, *per* Lord Cottenham.

(*s*) See *Beecham v. Smith*, E. B. & E. 442, and *ante*, p. 875.

(*t*) See *Fox v. Hanbury*, Cowp. 445. In *Sharp v. Warren*, 6 Price, 131, it was however held that the steward of a friendly society was

entitled to recover, at law, a box of money belonging to the society, but run off with by one of its members.

(*u*) *Graves v. Sawcer*, Sir T. Raym. 15.

(*x*) 7 C. B. 229. See, too, *Buckley v. Barber*, 6 Ex. 164; and compare *Morgan v. Marquis*, 9 Ex. 145.

(*y*) B. & A. 395, affirmed on appeal, *Williams v. Barton*, 3 Bing. 139. See, too, *Farrar v. Beswick*, 1 M. & W. 682.

(*z*) Agreed to by Maule, J., in *Mayhew v. Herrick*, 7 C. B. 247; and by Wood, V.-C., in *Fraser v. Kershaw*, 2 K. & J. 500; but see *per* Coltman, J., 7 C. B. 246.

their demand in respect of this wrongful sale can or cannot be regarded as independent of any question of account, so as to bring the case within the exception already noticed (a). This point has not yet been decided, and in the absence of an express decision it is not easy to see why the action should not lie.

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The cases generally referred to as types of those in which one partner cannot sue another at law are *Bovill v. Hammond*, *Holmes v. Higgins*, *Neale v. Turton*, and *Fox v. Hanbury*.

In *Bovill v. Hammond* (b) three persons undertook for a commission, which was to be divided between them, to procure a cargo for a ship belonging to a third party. The defendant paid all the expenses incidental to the joint undertaking, and received all monies that were paid for the use of the owner; and the defendant had in his hands more than sufficient to repay his outlays and to cover the commission agreed to be paid to himself and his co-adventurers. They having become bankrupt, he was sued by their assignees for their share of the commission in his hands. But it was held that the action was not sustainable, no account between the three having ever been come to, and that the circumstance that the defendant had settled his account with the owner of the ship made no difference.

Bovill v. Hammond.
Action for share of profits.

In *Holmes v. Higgins* (c) several persons subscribed for the purpose of obtaining an act of Parliament for the construction of a railway. The defendant was one of them, and was their chairman; the plaintiff was another, and was appointed an agent of the subscribers to the undertaking, and he sued the defendant for services rendered to the company as such agent. It was held that the subscribers were all partners, and that the plaintiff could not therefore sue the defendant or the body of subscribers at large. The Court observed, "It is perfectly clear that one partner cannot maintain an action against his co-partners for work and labour performed or money expended on account of the partnership" (d).

Holmes v. Higgins.
Action for services.

(a) *Ante*, p. 874, *et seq.*

(b) 6 B. & C. 149.

(c) 1 B. & C. 74.

(d) This case has been overruled

upon the point that the subscribers in question were partners. But the case is still a leading authority for the proposition stated in the text,

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Neale v. Turton.

Action on bill
accepted by a
company of
which plaintiff
is a member.

In *Neale v. Turton* (e), the plaintiff was a shareholder in *The London Patent Steam Washing Company*, and had supplied the company with hay and straw for its horses. In order to obtain payment, he drew a bill on *The Directors of The London Patent Steam Washing Company*, and this bill was accepted, payable at the Bank of England, "per proprietors of the *London Steam Washing Company*." This acceptance was signed by the secretary of the company, who, however, had no authority to accept bills for the company. On this bill the defendant sued the directors of the company, but it was held that the action would not lie. In delivering judgment the Court said, "It may be admitted that if a partner were to draw on other partners by name, and they were individually to accept, he might recover against them, because by such an acceptance a separate right is acknowledged to exist (f). But that is not the case here, for the bills are drawn on the directors of the company and accepted for the directors. They are the agents of the company, and accept as agents of the company. The case, therefore, is that of one partner drawing on the whole firm, including himself. There is no principle by which a man can be at the same time plaintiff and defendant. We are clearly of opinion that these bills, being drawn on the directors, are, in effect, drawn on the company of which the plaintiff is himself a member; and the rule, therefore, which has been obtained for entering a nonsuit must be made absolute."

Actions between
two firms with a
common partner.

The reasoning of the Court in the above case obviously applies to actions brought by one firm against another firm where one or more persons are partners in both firms; and it is clear that such an action cannot be sustained (g). Even

and also for the proposition that although projectors of companies are not partners, one of them cannot maintain any action at law against the others for services rendered to the whole body after he himself joined it. See *Wilson v. Curzon*, 15 M. & W. 532; *Bartlett v. Lambert*, 10 Jur. 416; *Lucas v. Beach*, 1 Man. & Gr. 417; *Goddart v. Hodges*, 1 Cr. & M. 33; *Milburn v. Codd*, 7 B. & C. 419,

and *Culdicott v. Griffiths*, 8 Ex. 898, where however the action was successful, as the plaintiff was not to be paid out of a fund subscribed to by himself.

(e) 4 Bing. 149, See, too, *Teague v. Hubbard*, 8 B. & C. 345, and 2 Man. & Ry. 369.

(f) See acc. *Fox v. Frith*, 10 M. & W. 131.

(g) See *Moffat v. Van Millingen*, 2 Bos. & P. 124, note; *Mainwaring*

where the common partner is dead, the one firm cannot sue the other in respect of contracts entered into between the two firms when he was a partner in each of them; for no legal contract can subsist between a person and those connected with him on the one side, and himself and others connected with him on the other side (*h*).

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Fox v. Hanbury (*i*) is the leading authority for the rule that one partner cannot sue another at law on the ground that the other detains, and uses for his own exclusive purposes, personal property belonging to the firm; and for the further rule that if one partner sells such property, neither the other partners nor their assignees in bankruptcy can maintain an action against the purchaser in respect of his detention of the goods purchased (*k*).

Fox v. Hanbury.
Trover.

In conclusion on this head it may be observed, that where a partnership has been dissolved, and the winding up of its affairs has been entrusted to one or two individuals, and they have taken upon themselves the duty of getting in the assets, and paying the debts, and dividing the surplus, they cannot, under ordinary circumstances, be compelled by proceedings at law to pay over that surplus to those entitled to it (*l*). If, indeed, the accounts have all been taken, and the net balance payable to any particular partner has been ascertained, and if such balance clearly ought to be paid over at once, then, as was seen in a previous page, an action for it may be brought (*m*); but in other cases recourse must be had to a court of equity.

Action for share
of surplus on
dissolution.

v. Newman, ib. 120; *Perring v. Hone*, 2 C. & P. 401, and 4 Bing. 28; *Jacaud v. French*, 12 East, 317; *De Tastet v. Shaw*, 1 B. & A. 664.

(*h*) *Bosanquet v. Wray*, 6 Taunt. 597.

(*i*) Cowp. 445. This case has always been followed with approbation. See *Smith v. Stokes*, 1 East, 363; *Smith v. Oriell*, ib. 368; *Harvey v. Crickett*, 5 M. & S. 336; *Buckley v. Barber*, 6 Ex. 164.

(*k*) It seems from *Morgan v. Marquis*, 9 Ex. 145, that if a solvent

partner sells goods of the firm, the purchaser, if he afterwards sells the goods, cannot be compelled to hand over any part of the proceeds to the assignees of the insolvent partners. Compare this with *Mayhew v. Herriek*, 7 C. B. 229, and *Buckley v. Barber*, 6 Ex. 164.

(*l*) *Lyon v. Haynes*, 5 Man. & Gr. 504, and see *Lewis v. Edwards*, 7 M. & W. 300, as to a receiver suing for money withheld from him by those who agreed that he should receive and distribute it.

(*m*) *Ante*, p. 874.

3. *Actions between companies and their shareholders.*Bk. III. Chap. 10.
Sect. 2.Actions between
companies and
their members.

With respect to ordinary actions between companies and their shareholders, little remains to be added to what has been said in previous chapters (*n*). The following subjects have, in fact, been already considered, viz.:—

1. Actions between the promoters of companies and by and against persons who subscribed for shares (*o*).

2. Actions by shareholders for being improperly on or off a company's register, and for having had their shares illegally forfeited (*p*).

3. Applications by shareholders to have a company's register rectified (*q*).

4. Actions between the buyers and sellers of shares, and between them and the brokers employed by them (*r*).

It has also been seen that, as regards unincorporated companies, not represented by public officers, there are great difficulties, as well in the way of their suing, as of their being sued by their own shareholders. The proper and improper methods to which recourse is had in order to obviate these difficulties have been referred to (*s*); and it has been shown that the difficulties alluded to have no existence in actions between incorporated companies and their shareholders, nor in actions between public officers and the members of the companies they represent, if such actions are maintainable at all, which, speaking generally, they now are (*t*).

There only remain for consideration in the present place a few rules relating to actions for calls and dividends, and the remedy by *mandamus* in the case of the non-performance by companies of their duties towards their shareholders.

(*n*) If a company is merely a large partnership, one shareholder cannot sue another at law for a debt owing to him by the company, and it has been held that such an action is not sustainable by a *cestui que trust* of the ostensible owner of a share. See *Goddard v. Hodges*, 3

Tyr. 209, and 1 Cr. & M. 33. *Sed quære.*

(*o*) *Ante*, p. 862, *et seq.*

(*p*) *Ante*, pp. 147 and 735.

(*q*) *Ante*, pp. 145 and 171.

(*r*) *Ante*, p. 716, *et seq.*

(*s*) *Ante*, pp. 859—861.

(*t*) *Ante*, pp. 857—859.

Actions for calls.

An action for calls (*u*) must be brought in the name of the company, if it is incorporated; and in the name of the public officer if the company is empowered to sue its shareholders in that manner (*x*).

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Actions for calls.

Several of the modern acts of Parliament relating to companies, contain provisions having for their object the simplification of the pleading and proofs in actions for calls (*y*). Their general effect is to render it necessary for a declaration in an action for calls to state merely that the defendant, as a shareholder, is indebted to the company in so much money for calls, omitting all statements respecting the making of the calls in question. As regards proof, the general effect of the provisions referred to is to render it necessary to show merely three things; viz., first, that the calls sued for were made in point of fact; secondly, that the defendant is, or was, a shareholder when the call was made (*z*); and, thirdly, that he has had proper notice of the making of the call.

Statutory enactments.

In an action, or a cross-action (*a*) for calls, the statutory form of declaration should be adopted in every case to which it is applicable (*b*). But a declaration is not demurrable for containing averments which may be rejected as surplusage; and therefore a declaration by a company, governed by the Companies clauses consolidation act, averring not only that the defendant was a shareholder when the call was made, but

Form of declaration.

(*u*) As to which, see *ante*, p. 624, *et seq.*

(*x*) *Chapman v. Milvain*, 5 Ex. 61; *Wills v. Sutherland*, 4 Ex. 211, affirmed in error, 5 Ex. 715; *Skinner v. Lambert*, 4 Man. & Gr. 477; *Lawrence v. Wynn*, 5 M. & W. 355; *Smith v. Goldsworthy*, 4 Q. B. 430. See a declaration in an action for calls, by a company incorporated by the Canadian legislature, *Welland Rail. Co. v. Blake*, 6 H. & N. 410.

(*y*) See 8 & 9 Vict. c. 16, §§ 26—28, 25 & 26 Vict. c. 89, § 70.

(*z*) See, as to this, *ante*, p. 142, &c.

(*a*) By a plea of set-off, *Moore v. Metropolitan Sewage Co.*, 3 Ex. 333.

(*b*) *Wolverhampton, &c., Waterw. Co. v. Hawksford*, 6 C. B. N. S. 336; 7 ib. 795, and 11 ib. 546; *Dundalk, &c., Rail. Co. v. Tapster*, 1 Q. B. 667; *Newport, &c., Rail. Co. v. Hawes*, 3 Ex. 476; *Wilson v. Birkenhead, &c., Rail. Co.*, 6 Ex. 626. The last case shows that a declaration in the statutory form is unobjectionable. As to calls payable by instalments, see *ante*, p. 631, note (*a*).

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that he still is a shareholder, has been held not to be bad, even on special demurrer (*e*). The form of declaration given by the Companies clauses act is not applicable to an action against an executor for calls made in the lifetime of his testator (*d*).

Time for bringing action.

Calls made payable by statute (*e*), or by deed, are specialty debts; and an action for their recovery is not, therefore, barred by the lapse of less than twenty years (*f*).

Defences.

The usual grounds of defence to an action for calls have all been considered in previous chapters. They may be reduced to:—

1. A denial that the defendant is a person liable to pay the call (*g*).

2. A denial of the making of the call in point of fact.

3. A denial that the call, admitted to have been made in point of fact, was authorised (*h*), was made by competent persons (*i*), or in the proper manner (*k*), or for proper purposes (*l*).

4. A denial of any notice of the call.

5. A denial of such notice as the defendant was entitled to receive (*m*).

6. Infancy (*n*).

7. Fraud (*o*).

It must be borne in mind, that if a shareholder does not avail himself of such defence as he may have at the proper time, he will be precluded from afterwards disputing either the validity of the call, or his liability to pay it (*p*).

(*c*) *Midland, &c., Rail. Co., v. Evans*, 4 Ex. 649; *East Lanc. Rail. Co. v. Croxton*, 5 Ex. 287.

(*d*) *Birkenhead, &c., Rail. Co. v. Cotesworth*, 5 Ex. 226.

(*e*) Calls made under a colonial act are simple contract debts only. See *Welland Rail. Co. v. Blake*, 6 H. & N. 415.

(*f*) *Cork and Bandon Rail. Co. v. Goode*, 13 C. B. 826. Compare *Robinson's case*, 6 De G. Mac. & G. 572.

(*g*) See *ante*, p. 634, and as to

estoppel by conduct, *ante*, p. 636, &c.

(*h*) *Ante*, p. 631.

(*i*) *Ante*, p. 625.

(*k*) *Ante*, p. 630.

(*l*) *Ante*, p. 626.

(*m*) *Ante*, p. 633.

(*n*) *Ante*, p. 87 and 637.

(*o*) *Ante*, p. 637, and *Smith v. Reese River Co.*, L. R. 2 Eq. 264.

(*p*) See *Thames Haven, &c., Co. v. Hall*, 5 Man. & Gr. 274; *Thames Haven, &c., Co. v. Rose*, 4 ib. 552.

Nil debet is a bad plea to an action for calls due on a specialty, and a bad replication to a plea of set-off of such calls (*q*). Bk. III. Chap. 10.
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Under a plea of never indebted, a defendant in an action for calls, may show that he is not a shareholder (*r*), and that the calls sued for have not been duly made (*s*). Nevertheless, the Court will allow a defendant both to plead never indebted and also to deny that he is a shareholder (*t*); but it has refused to allow a defendant to plead, with the general issue, that the calls were made by persons not properly qualified, that no notice of the calls was given, that no time or place for receiving payment was appointed, that the calls were made for unauthorised purposes, that they were not made on all the subscribers and proprietors, that the shares in respect of which the call was demanded had been improperly created (*u*). Pleas.

Evidence of the making of a call is usually given by proving the resolution by which it was made; and this may be done either by the testimony of the company's secretary, or some other person having actual knowledge of the fact, or by the company's minute books, which, as was seen in a former chapter, are in many cases made admissible as evidence of the facts stated in them (*x*). Evidence.

Evidence that the defendant is or was a shareholder is usually

(*q*) *Milvain v. Mather*, 5 Ex. 55.

(*r*) *Birkenhead, &c., Rail. Co. v. Brownrigg*, 4 Ex. 426. See, too, *Consols Insur. Assoc. v. Newall*, 3 Fos. & Fin. 130, where the defendant proved that the deed which he signed had a blank in it for his number of shares.

(*s*) *London and Brighton Rail. Co. v. Wilson*, 6 Bing. N. C. 135; *South Eastern Rail. Co. v. Hebblewhite*, 12 A. & E. 497; *Shropshire Union Rail. Co. v. Anderson*, 3 Ex. 401.

(*t*) *Ibid.*

(*u*) *Ibid.*, and see further, as to what pleas will and what will not be allowed, *Waterford, &c., Rail. Co. v. Logan*, 14 Q. B. 672; *London and Brighton Rail. Co. v. Fair-*

clough, 6 Bing. N. C. 270. In *Aylesbury Rail. Co. v. Mount*, 7 Man. & Gr. 898, a plea showing that the defendant was not a shareholder was held bad on special demurrer, as amounting to an argumentative denial of the debt; and, in *Wills v. Robinson*, 5 Ex. 302, a plea that the persons stated to form a board of directors did not constitute such board, was held not warranted by leave to plead that the persons who made the call did not constitute a board of directors. Never indebted may be pleaded to an action for calls by a foreign company, *Welland Rail. Co. v. Blake*, 6 H. & N. 415.

(*x*) See *ante*, p. 565.

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given by the production of the company's register, the effect of which has been considered already (*y*).

Evidence that the defendant received due notice of the making of the call must be given by showing that the requisite advertisements (if any) were published, and that such notice as he was entitled to receive either actually reached him, or was so sent to him as to have probably reached him. This will be sufficient, in default of evidence that what was so sent him did not reach him (*z*).

Actions for dividends.

Actions for
dividends.

Dividends (*a*), which are actually declared and payable by an incorporated company, are recoverable by action at law brought by the person legally entitled to receive them, against the company. The plaintiff must prove that the dividend sought to be recovered has been declared, and has become payable, and that he is entitled at law to the dividend payable in respect of the shares by virtue of which he claims it. The circumstance that he is not a registered shareholder will not prejudice him if he has been wrongfully removed by the company from the register (*b*); nor will the circumstance that the plaintiff is a married woman be fatal to her claim if she might have sued with her husband, and his non-joinder has not been pleaded in abatement (*c*).

As was seen in the chapter on dividends, the non-payment of calls is, in most companies, an answer to an action for dividends; and even where it is not so, calls and dividends may, it is conceived, be set off against each other.

Dividends of
unincorporated
companies.

Whether a dividend declared by an unincorporated company can be recovered at law is a question of some difficulty. If those cases are excepted, in which, on principles before explained, an action will lie by one partner against another for money in the hands of the latter payable to the former, it will perhaps not be going too far to say that the above question

(*y*) See *ante*, p. 142, *et seq.* *et seq.*

(*z*) *Eastern Union Rail. Co. v. Symonds*, 5 Ex. 237.

(*b*) *Dalton v. Midland Rail. Co.*, 12 C. B. 458, and 13 ib. 474.

(*a*) As to which, see *ante*, p. 775,

(*c*) *Ibid.*

must be answered in the negative (*d*). Even if the company is empowered to sue and be sued by a public officer, and an action by a shareholder against him for a dividend declared and payable might possibly lie, there would be very great, not to say insuperable, difficulties in executing a judgment obtained by the plaintiff in such an action. It must be executed, if at all, against individual shareholders; but they clearly are not as such debtors to the plaintiff for the dividends he seeks to recover. No instance of an ordinary action by a shareholder against a public officer for dividends is known to the writer.

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Of the writ of mandamus.

Prior to the Common law procedure act, 1854, which greatly enlarged the jurisdiction of the courts with respect to the issuing of writs of mandamus, it was a rule not to allow a mandamus to go for the purpose of enforcing a mere private right. It was only issued to compel the specific observance of some public duty, for the non-performance of which there was not at law any other adequate remedy. The older cases upon this subject are not however so uniform as might be desired; for whilst there was authority for saying that a mandamus would go to an incorporated trading company to compel it to admit persons to offices to which they had been duly elected (*e*), a mandamus has been refused to compel a company to pay a shareholder dividends wrongfully withheld from him (*f*); to compel a company to register a transfer of its stock (*g*); to compel it to produce its books to the shareholders for the purpose of enabling them to consider whether a dividend should or should not be declared and paid (*h*); to compel it to make calls for the payment of a debt (*i*).

Mandamus.

The Common law procedure act, 1854 (*k*), however, autho-

17 & 18 Vict.
c. 125.

(*d*) See *Lyon v. Haynes*, 5 Man. & Gr. 504. Doug. 524; *R. v. London Ins. Co.*, 5 B. & A. 899.

(*e*) *Anon.*, 2 Str. 696; *Da Costa v. Russia Co.*, ib. 783; Com. Dig. Mand. B. 2. (*h*) *R. v. Bank of England*, 2 B. & A. 620.

(*f*) *R. v. Whitstable Co.*, 7 East, 353. (*i*) *R. v. Victoria Park Co.*, 1 Q. B. 288.

(*k*) 17 & 18 Vict. c. 125, § 68.

(*g*) *R. v. Bank of England*, 2

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Where the writ
will go.

rises the issuing of a mandamus to enforce the fulfilment of any duty in the fulfilment of which the person applying for the writ is personally interested; and although it has been held that the writ ought not to issue for the purpose of compelling the specific performance of an ordinary agreement (*l*), it has been allowed to go to compel a chartered company to register as a shareholder, a person entitled to be so registered by the provisions of the company's deed of settlement (*m*). It may, therefore, it is conceived, be safely stated that wherever a company refuses to perform a duty imposed upon it by its special act, charter, or deed of settlement, or by any general statute by which its proceedings are governed, a mandamus to compel it to perform such duty will be issued whether the duty is public or private. In support of this view it may be observed that, notwithstanding the cases above referred to, modern authorities show that even the prerogative writ of mandamus will go to compel—

The production of a company's register to a creditor (*n*);

The entry on the register of the probate of the will of a deceased shareholder (*o*);

The registry of transfers of shares (*p*);

The production to a shareholder, for a proper purpose and at a proper time, of such books as he has a right to inspect (*q*);

The election of directors and officers required to be appointed (*r*);

The appointment of a public officer by a company empowered to sue and be sued by one (*s*);

(*l*) *Benson v. Paull*, 6 E. & B. 273.

(*m*) *Norris v. Irish Land Co.*, 8 E. & B. 512.

(*n*) *R. v. Derbyshire, &c., Rail. Co.*, 3 E. & B. 784.

(*o*) *R. v. Worcester Canal Co.*, 1 Man. & Gr. 529.

(*p*) See *R. v. Londonderry, &c., Rail. Co.*, 13 Q. B. 998; *R. v. Wing*, 16 ib. 645; *R. v. General Cemetery Co.*, 6 E. & B. 415, and see *ante*, p. 145.

(*q*) *R. v. Saddlers' Co.*, 10 W. R. 87. See, also, *R. v. Wilts, &c., Canal Co.*, 3 A. & E. 477, and *R. v. Maraquita, &c., Mining Co.*, 5 Jur. N. S. 725, Q. B. In the two last cases, however, the writ was refused.

(*r*) See *per* Tindal, C. J., in *Thames Haven Dock Co. v. Rose*, 4 Man. & Gr. 559.

(*s*) See *per* Parke, B., in *Steward v. Graves*, 10 M. & W. 721.

The payment by such a company of a debt for which judgment has been obtained against its officer (*t*). Bk. III. Chap. 10.
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The making of a call for the payment of a creditor having no other remedy (*u*).

These cases clearly show a tendency in modern times to grant a mandamus where formerly it would have been refused. But the granting of a prerogative writ being within certain limits a matter of discretion with the Court, no mandamus is allowed to go unless the applicant has been denied the right he seeks to enforce (*x*); nor unless he applies for the writ within a reasonable time after such denial (*y*); nor unless the Court is satisfied that its interference is sought for a proper purpose (*z*); nor unless the applicant having a legal right has no other adequate remedy at law (*a*). The last rule is held to apply to actions for a mandamus under the Common law procedure act, 1854 (*b*); and probably the other rules are also applicable to them. It is worthy of remark, that notwithstanding the tendency to extend the application of the prerogative writ, it has very recently been held that such writ only goes to enforce the performance of acts required to be done, and not the undoing of acts already done; and that consequently, although a corporation may be compelled by mandamus to affix its seal to a document (*c*), it cannot be thus compelled to remove its seal from a document (*d*). How far this distinction applies to actions under the statute remains to be seen; but it is submitted that the difference between doing and undoing, is, in such a case as that alluded

(*t*) *Corpe v. Glyn*, 3 B. & C. 801; *R. v. St. Katherine Dock Co.*, 4 B. & Ad. 360. A. & E. 477; *R. v. Liverpool, Manchester, &c., Rail. Co.*, 21 L. J. Q. B. 284.

(*u*) See *R. v. Victoria Park Co.*, 1 Q. B. 288, where the mandamus was refused, the creditor being in a position to issue execution against the company, though not to get satisfaction by so doing. (*a*) See *R. v. Chester*, 1 T. R. 396; *R. v. Stafford*, 3 ib. 646; *R. v. Victoria Park Co.*, 1 Q. B. 288.

(*x*) *R. v. Wilts, &c., Canal Co.*, 3 A. & E. 477. (*b*) *Bush v. Beavan*, 1 H. & C. 500.

(*y*) *R. v. Cockermouth Inclosure Commissioners*, 1 B. & Ad. 378. (*c*) *R. v. Windham*, Cowp. 377; *R. v. Cambridge*, 3 Burr. 1647; *R. v. York*, 4 T. R. 699.

(*z*) *R. v. Wilts, &c., Canal Co.*, 3 (*d*) *Ex parte Nash*, 15 Q. B. 92.

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to, a difference in words rather than in substance. Registers of shareholders may be rectified both by inserting names wrongfully omitted, and by striking out names wrongfully inserted as has been seen already (e).

SECTION III.—SUITS IN EQUITY BETWEEN PARTNERS.

Subject of the
present section.

Owing to the ability of courts of equity not only to investigate complicated accounts, but also to compel the specific performance of agreements, to restrain breaches of duty for the future, and to rescind contracts tainted with fraud, it is to them rather than to courts of law that partners usually have recourse for the settlement of disputes amongst themselves. It is proposed in the present section to explain the doctrines by which courts of equity are guided, as well in affording as in refusing assistance to one partner against another; and for this purpose to advert, in the first place, to some important general principles applicable to the subject in question, and then to examine particular remedies under the heads of—Rescission of contract, Specific performance, Account and discovery, Injunction, Receiver, and Sale of partnership property.

The subject of winding up companies will be reserved for the next Book.

1. *Interference between partners generally.*

General rules as
to interference
between part-
ners.

There are four general rules by which courts of equity are influenced when their interference is sought by one partner against another, and to which it will be convenient at once to refer. These rules are 1, not to interfere except with a view to dissolve the partnership; 2, not to interfere in matters of internal regulation; 3, not to interfere at the instance of persons who have been guilty of laches; and 4, not to interfere unless all proper parties are before the court.

1. *Of the rule not to interfere except with the view to dissolve the partnership.*

Necessity of
praying for a
dissolution.

Formerly courts of equity were averse to interfering at all between one partner and another, unless it was for the purpose

(e) See *ante*, pp. 145 and 171.

of dissolving the partnership ; or, if it was dissolved already, of finally winding up its affairs. Hence it will be found on reference to the older reported decisions, that if a dissolution was not sought, the court would not decree a partnership account, nor restrain a partner from infringing the partnership articles, nor protect the partnership assets from destruction or waste. This rule, at no time perhaps very inflexible, has gradually been relaxed, it having been discovered to be more conducive to justice, to interfere to prevent some definite wrong, or to redress some particular grievance, than to decline to interfere at all unless complete justice can be done by winding up the partnership, and in that manner settling all disputes. At the same time so difficult is it to shake off old associations, and to run counter to established rules, that traces of the aversion alluded to may yet be found in the decisions of the courts, and especially in those which relate to the specific performance of agreements to form partnerships, and in those which relate to the appointment of receivers and managers. Indeed, notwithstanding the extent to which the rule has been relaxed in suits for an account, or for an injunction, one of the first points for consideration, even now, when one partner sues another in equity, is, can relief be had without dissolving the concern ? Undoubtedly it may, much more certainly than formerly, but not always when perhaps it ought. Without stopping to inquire how the question is to be answered in any particular case (for that will be discussed hereafter), it may be stated as a general proposition, that courts of equity will not, if they can avoid it, allow a partner to derive advantage from his own misconduct by compelling his co-partner to submit either to continued wrong, or to a dissolution (*f*); and that rather than permit an improper advantage to be taken of a rule designed to operate for the benefit of all parties, the courts will interfere at the present day where formerly they would have declined to do so. At the same time they will not take the management of a going concern into their own hands, and, if they cannot usefully interfere in any other manner, they will not interfere at all unless for the purpose of winding up the partnership.

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Modern rule.

(*f*) See *Fairthorne v. Weston*, 3 Ha. 392.

2. *Of the rule not to interfere in matters of internal regulation.*Bk. III. Chap. 10.
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interfere in mat-
ters of internal
regulation.Internal ma-
nagement of
companies.

A court of equity will not interfere between partners merely because they do not agree. It is no part of the duty of the court to settle all partnership squabbles: it expects from every partner a certain amount of forbearance and good feeling towards his co-partner; and it does not regard mere passing improprieties, arising from infirmities of temper, as sufficient to warrant a decree for dissolution, or an order for an injunction, or a receiver (*g*). And when partners have themselves agreed that the management of their affairs shall be entrusted to one or more of them exclusively, the Court will not remove the managers, or interfere with them, unless they are clearly acting illegally and in breach of the trust reposed in them (*h*).

This principle has been extended to companies, and, as a general rule, it may be stated that a court of equity will not interfere between members of companies for the purpose of enforcing duties arising out of matters which are properly the subject of internal regulation. It will not interfere to control a majority, unless it sees that the majority has been or is doing, or is about to do, that which it is illegal even for a majority to do; and it follows from this, that the court will not interfere in matters properly the subject of internal management until all reasonable attempts have been made to take the sense of the general body of partners on the matters in question; nor even then unless it is called upon to interfere to give effect to the will of the majority against a factious minority.

The leading decisions on this subject are *Carlen v. Drury*, *Foss v. Harbottle*, and *Mozley v. Alston*, which will serve to illustrate the application of the principle in question, as well to unincorporated as to incorporated companies.

In *Carlen v. Drury* (*i*), a large number of persons were part-

(*g*) See *Marshall v. Colman*, 2 J. Beav. 190.

& W. 266; *Smith v. Jeyes*, 4 Beav. 503; *Lawson v. Morgan*, 1 Price, 307; *Cofton v. Hornor*, 5 Price, 537; *Warder v. Stilwell*, 3 Jur. N. S. 9; *Anderson v. Anderson*, 25

(*h*) See *Lawson v. Morgan*, 1 Price, 307; *Waters v. Taylor*, 15 Ves. 10.

(*i*) 1 V. & B. 154. See, also, *Waters v. Taylor*, 15 Ves. 10; *Ellis*

ners in a concern called *The Bankside Brewery*, and six of them on behalf of themselves and co-partners, filed a bill against the managers and others, alleging circumstances of gross mismanagement and neglect on the part of the managers, and praying for an account, a dissolution, and a receiver. It appeared that by the company's deed of settlement, the managers might be removed at any general meeting; that general meetings were to be held at Lady-day and Michaelmas, or within a month after, at such place as the managers should appoint; that a committee of twelve persons should be annually elected for auditing accounts, and advising the managers; that if the managers should misbehave themselves, this committee, or any seven of them, should have the power of calling a special general meeting of shareholders to report thereon; and that no dissolution should be made without the consent of a majority of three-fourths of the shareholders at a general meeting. A motion for an injunction and a receiver was refused with costs, the Court not being satisfied that the means of redress provided by the parties themselves in the articles were not effectual, and being of opinion that the plaintiffs had a remedy in their own hands to which they had not resorted. From the judgment of Lord Eldon, it appears that the Court would, if necessary, have compelled the managers to call meetings; that in a case of delinquency clearly made out the Court would have acted without hesitation; but that there must have been a positive necessity for the interference of the Court arising from the refusal or neglect of the committee to act; and that the Court would not interfere before the parties had tried that jurisdiction which the articles had themselves provided.

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Complaints
against remov-
able directors.
Carlen v. Drury.

In *Foss v. Harbottle* (k), two members of an incorporated company, called *The Victoria Park Company*, filed a bill against the directors and others, charging them with a variety of fraudulent and illegal acts, whereby the property of the company was misapplied, aliened, and wasted, and praying that the defendants might make good to the company the losses sustained by the acts complained of, and that a receiver might

Alleged fraud
and misconduct.
*Foss v. Har-
bottle.*

son v. Bignold, 2 Jac. & W. 503; 180; *Miles v. Thomas*, 9 Sim. 606.
Beaumont v. Meredith, 3 V. & B. (k) 2 Ha. 461.

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be appointed to apply the property of the company in discharge of its liabilities, and to secure the surplus. The general result of the act incorporating the company was (in the opinion of the Court) to make the directors the governing body, subject to the superior control of the proprietors, who, when assembled in general meeting, had power to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they might have originated. The Court was of opinion that the acts of the defendants complained of were of such a nature as to be capable of confirmation by a majority of the members of the company; that it did not appear that any attempt had been made to bring those acts before a general meeting of the shareholders; and that under those circumstances, the Court could not interfere at the suit of a minority, whatever it might have been induced to do if proper means had been resorted to and found ineffectual to set the general body of shareholders in motion.

Directors improperly appointed.
Mozley v. Alston.

In *Mozley v. Alston* (l), a bill was filed by two shareholders of a railway company against the company and its directors, alleging that the latter had been illegally appointed; that they had possession of the seal of the corporation; and that they were about to use it for various improper purposes. The bill prayed that the directors who were defendants might be restrained from acting as directors, and be ordered to place the seal, and the books and documents of the company under the control of its lawful directors. It appeared from the statements of the bill that a majority of the shareholders agreed with the plaintiffs in their view of the illegality of the defendants' appointment, and the Court held that, if that were so, there was nothing to prevent the company from filing a bill in its corporate character to remedy the alleged evils; and that as the plaintiffs showed no reason to justify them alone in applying to the Court for redress, they were not entitled to its assistance.

Improper calls.

These cases have been followed by a variety of others (m),

(l) 1 Ph. 790.

(m) See, in addition to those mentioned in the text, *Edwards v.*

The Shrewsbury and Birmingham Rail. Co., 2 De G. & Sm. 537; *Yetts v. The Norfolk Rail. Co.*, 3 ib.

One of the most characteristic of the class is perhaps *Bailey v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company* (*n*), where a bill was filed by one of a set of shareholders in an amalgamated company, alleging that an unfair and unnecessary call had been made upon that set, and seeking to restrain proceedings to enforce payment of the call. Lord Langdale thought that the case could only be considered as an attempt to induce the Court to interfere in the internal management of the affairs of a company, and to take upon itself to determine a question which might and ought to be determined by the shareholders themselves at general meetings.

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Bailey v. Birkenhead, &c. Railway Company.

Again, in the recent Scotch case of *Orr v. Glasgow, &c., Railway Company* (*o*), a suit was instituted against a railway company and its directors, seeking redress on the ground that the directors were also directors of a rival company, and were acting in the interests of that company to the prejudice of the shareholders in the first company. The specific relief sought was, that certain calls might be set aside, and that monies already paid, for calls previously made, might be returned; but the suit was dismissed, on the ground that although the acts of the directors were beyond their powers, it was competent to the shareholders to ratify and adopt those acts, and the suit was not instituted for the protection of the majority of shareholders.

Orr v. Glasgow Railway Company.

Other instances illustrating the same principle will be referred to hereafter when treating of injunctions.

In such cases as these, those who complain of the managing body should, before appealing to the Court of Chancery, endeavour to bring their grievances before their fellow shareholders, and ascertain what the views of the majority are (*p*). If the majority disapprove the conduct complained of, they can file a bill in the name of the company,

Course to be taken by minority.

293; *Kent v. Jackson*, 14 Beav. 367, and 2 De G. Mac. & G. 49; *Inderwick v. Snell*, 2 Mac. & G. 216.

(*n*) 12 Beav. 433.

(*o*) 3 MacQu. 799. Compare *Hodgkinson v. National Live Stock*

Insurance Co., 26 Beav. 473, and 4 De G. & J. 422, where, however, relief was sought in respect of other matters than the call.

(*p*) See the foregoing cases.

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and so obtain redress (*q*). If, however, the majority agree with and sanction the course adopted or proposed to be adopted by the managing body, *and if that course is not illegal if approved by the majority*, the Court clearly cannot interfere. But if that course will be illegal, although sanctioned by the majority of shareholders, then, even if it is approved by all of them except one, the Court will interfere at the suit of that single dissentient shareholder, and protect him and his interests: and in such a case it is not essential that he should appeal to the other shareholders before applying to the court (*r*).

Majority not interfered with if they are not doing what is illegal.

Lord *v.* Copper Miners' Company.

As an illustration of the proposition that the majority cannot be interfered with if they are not doing what it is illegal for them to do, reference may be made to the case of *Lord v. The Governor and Company of Copper Miners in England* (*s*), where a shareholder in an incorporated mining company filed a bill to restrain the governing body from vesting the property of the company in trustees for the benefit of its creditors. Lord Cottenham (reversing the decision of V.-C. Knight Bruce) allowed a demurrer to the bill, on the ground that it was competent for a majority of shareholders to sanction such a proceeding, and that it appeared that in fact they had sanctioned it.

Otherwise if it is doing what is illegal.

The important principle that one out of any number of shareholders or partners is entitled to the protection of the court against the *illegal* acts of the others (*t*), although he

(*q*) See the observations in *Foss v. Harbottle*, and *Mozley v. Alston*, above referred to. In *The Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 211, a minority filed a bill in the name of the company, and the Court ordered a motion to take the bill off the file to stand over until a general meeting of shareholders had been called, and their opinion taken upon the question whether the suit should be proceeded with. The same course was adopted in *East Pant du Lead Mining Co.*, 2 Hem. & M. 254, where the bill was ultimately taken off the file.

(*r*) See *Gregory v. Patchett*, 33 Beav. 595. The contrary receives some countenance from, but is not really warranted by, *Edwards v. Shrewsbury, &c., Rail. Co.*, 2 De G. & S. 537.

(*s*) 2 Ph. 740. See, too, *Gregory v. Patchett*, 33 Beav. 595; *Kent v. Jackson*, 14 Beav. 367, and 2 De G. Mac. & G. 49; *The Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 219; *Inderwick v. Snell*, 2 Mac. & G. 216, where directors complained that they had been wrongfully removed.

(*t*) *i. e.*, illegal although sanctioned by a majority.

stands alone, was emphatically declared and strictly carried out by Lord Eldon in *Natusch v. Irving* (u) and *Const v. Harris* (v), both of which have been referred to in a former part of this work at considerable length (x). In those cases Lord Eldon was dealing with partnerships and unincorporated companies; but precisely the same principle applies to all companies, whether incorporated by act of Parliament, charter, letters patent, or registration.

Thus, in *Adley v. The Whitstable Company* (y), Lord Eldon restored a member of a company incorporated by act of Parliament, to rights from which he had been unlawfully excluded under colour of a bye-law of the company.

In *Preston v. The Grand Collier Dock Company* (z), the Vice-Chancellor of England overruled a demurrer to a bill, the object of which was to set aside an arrangement on the ground of fraud, and to compel certain shareholders to pay calls, although it had been in effect unanimously resolved at a special general meeting of the company that no calls should be made upon them. So in *Beman v. Rufford* (a), the Court, at the suit of a small minority of shareholders in a railway company, restrained what in effect would have been a transfer of the business of that company to another company, although the great majority of shareholders in the former were desirous that such transfer should be made. So the Court has interfered to protect the preference shareholders in a company against the directors and other shareholders, who intended to make an illegal apportionment of dividends (b). And upon the same principle, the Court has over and over again interfered, at the instance of a minority of shareholders, to prevent an application of the funds of companies, to purposes

(u) Gow on Partn. App. 398.

(v) T. & R. 518, 519.

(x) *Ante*, p. 605, *et seq.* See, too, *Chapple v. Cadell*, Jac. 537.

(y) 17 Ves. 315, and 19 ib. 304, and 1 Mer. 107, where a decree for an account of profits was made.

(z) 11 Sim. 327.

(a) 1 Sim. N. S. 550. See, too,

Winch v. The Birkenhead, &c., Rail. Co., 5 De G. & Sm. 562; *Salomons v. Laing*, 12 Beav. 377.

(b) *Henry v. Great Northern Rail. Co.*, 4 K. & J. 1, and 1 De G. & J. 606. See, too, *Carlisle v. The South Eastern Rail. Co.*, 1 Mac. & G. 689, and on the rights of preference shareholders, *ante*, p. 781.

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foreign to those, to attain which alone such companies were formed (c).

Information by
Attorney-Ge-
neral.

If a company incorporated for a special purpose is exceeding its powers to the detriment of the public, an information will lie; as an illustration of this, reference may be made to *Attorney-General v. Great Northern Railway Company* (d), where a railway company was restrained from carrying on extensive dealings in coals.

Factionous mi-
nority.

After the foregoing remarks, it scarcely requires to be mentioned that the Court will interfere to control a factionous minority which impedes the execution of the lawful resolutions of the majority (e). Nor can *Mozley v. Alston* (f) be considered as inconsistent with this proposition; for, although in that case the Court certainly did refuse to interfere, it was not called upon to do so in a suit properly framed; and it is tolerably clear from the judgment, that if the majority had chosen to institute a suit in the name of the corporation, the Court would have acted very differently (g).

3. *Of the rule not to interfere at the instance of persons who have been guilty of laches.*

Laches a bar to
relief in equity;

Independently of the Statutes of Limitations, a plaintiff may be precluded by his own laches from obtaining relief in a court of equity. Laches presupposes not only lapse of time, but also the existence of circumstances which render negligence imputable; and unless reasonable vigilance is shown in the prosecution of a claim, a court of equity, acting on the maxim, *vigilantibus non dormientibus subveniunt leges*, will decline to

(c) See *infra*, under the head injunction, where the cases will be found collected.

(d) 1 Dr. & Sm. 154.

(e) See *The Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 211, in which the Court did so interfere. See, too, *Fraser v. Whalley*, 2 Hem. & M. 10.

(f) 1 Ph. 790, and *ante*, p. 896.

(g) In *Miles v. Thomas*, 9 Sim.

606, V.-C. Shadwell declined to restrain the sailing of a ship, although it would seem that the majority of the shareholders of the company to which the ship belonged, were opposed to her sailing on the voyage on which she was about to be sent. The report of this case is however obscure, not only as to the facts, but also as to the reasons for the judgment.

interfere, and will leave the plaintiff to such remedy, if any, as he may have at law. Bk. III. Chap. 10.
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In the early case of *Sherman v. Sherman* (*h*), two persons had dealings as merchants; one of them died; his widow filed a bill for an account, but, although the Statute of Limitations did not apply, the bill was dismissed, on the ground that many years had elapsed since the dealings in question had taken place, and the deceased had allowed any claims he might have had to slumber (*i*). Again, where an account has been rendered, and has been long acquiesced in, unless fraud be proved, a court of equity will not re-open it, although the account may be shown to be erroneous, and although no final settlement was ever come to (*k*). The same principle is acted on in taking accounts; for charges long improperly made and acquiesced in, or long omitted to be made, are regarded, in the absence of fraud, as having been made or omitted by agreement, and the question of mistake will not be gone into (*l*). to a suit for an
account.
Sherman v.
Sherman.

Acquiescence in
accounts.

In suits by shareholders against companies and their directors, the laches of the plaintiff frequently proves fatal to his case. Laches in pro-
ceedings against
companies.

Thus, in *Gray v. Chaplin* (*m*), the directors of a canal company made an agreement for letting tolls for ninety-nine years, which agreement was both *ultra vires* and detrimental to the interests of the public. After the agreement had been acted upon for forty-seven years without any complaint being made, a bill was filed by two shareholders on behalf of themselves and the other shareholders to set aside the agreement and for an account. A great majority of the shareholders disavowed the suit, but the Vice-Chancellor held, that this was immaterial (*n*), and he made an order for a receiver. Upon appeal, however, from this order, Lord Eldon held, that the plaintiffs could not avail themselves of the interest which the public might have in the matters complained of; and that, whatever Setting aside
agreements.
Gray v. Chaplin.

(*h*) 2 Vern. 276.

(*i*) See, too, *Sturt v. Mellish*, 2 Atk. 610.

(*k*) *Scott v. Milne*, 5 Beav. 215, and on appeal, 7 Jur. 709. See, too, *Williams v. Page*, 24 Beav. 654; *Stupart v. Arrowsmith*, 3 Sm.

& G. 176, noticed *infra*, p. 902.

(*l*) *Thornton v. Procter*, 1 Anst. 94, and see pp. 763 and 770.

(*m*) 2 Russ. 126.

(*n*) See 2 Sim. & Stu. 267, and 2 Russ. 132, note.

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relief might be obtained by the Attorney-General on behalf of the public (o), the plaintiffs were precluded by their own laches and acquiescence from disturbing the possession of the lessee of the tolls, at all events before the hearing of the cause and in the absence of the Attorney-General to represent the public. The order for the receiver was accordingly discharged. What became of the suit afterwards does not appear, but Lord Eldon's judgment left the plaintiffs small hopes of obtaining a decree.

Compelling completion of works.
Graham v. Birkenhead Railway Company.

In *Graham v. The Birkenhead, &c., Railway Company* (p) a suit was instituted by a shareholder in a company to restrain the completion of part only of the company's works. There had been several suits for the same purpose instituted by other shareholders, but for reasons to which it is not material to advert, those suits were never effectually prosecuted. It had been known for a considerable time that it was not intended by the directors to complete the company's works as originally contemplated, and that in fact there were not sufficient funds for that purpose. It was also well known that the directors had for some time been completing part of the works. It was held that those who disapproved of the application of the company's funds to that limited extent, ought to have taken proceedings to stop it at once; and that having regard to the laches of the plaintiff he was not entitled to relief.

Making good breaches of trust.

Stupart v. Arrowsmith.

Again, in *Stupart v. Arrowsmith* (q), a suit was instituted by a shareholder in a company against its directors and others for the purpose of compelling them to restore funds of the company alleged to have been illegally applied in buying up shares (r), and for a general account. It appeared, however, that the alleged illegal purchase of shares had not taken place, that the directors had laid accounts before the shareholders showing the amount of the company's receipts and expenditure, and the balance to be divided; that these accounts had been adopted at a general meeting, and that payments had

(o) See *ante*, p. 900.

(p) 2 Mac. & G. 146, and 12 Beav. 460.

(q) 3 Sm. & G. 176. See, too, *Kent v. Jackson*, 14 Beav. 367, and

2 De G. Mac. & G. 49; *Gregory v. Patchett*, 33 Beav. 595; *Scott v. Izon*, 34 Beav. 434.

(r) See as to this, *Evans v. Coventry*, 8 De G. Mac. & G. 835.

been made to some of the shareholders upon the footing of these accounts. The suit was not instituted until three years after the adoption of the accounts, at the meeting referred to, and it was held that, under these circumstances, and no fraud having been proved, the plaintiff was not entitled to the interference of the court. Bk. III. Chap. 10.
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Again, in *Burt v. British Nation Assurance Society* (s) a suit by a director complaining of various improper acts done before he became a director, was dismissed on the ground that for two years he had had the means of knowing what had been done, and had sanctioned what he afterwards sought to impeach. Burt v. British
Nation.

It has even been held that a person who acquires a share from a former shareholder is precluded from complaining of what his predecessor could not complain of himself (t).

With respect to companies, by far the most important decision upon the subject of laches and acquiescence is *Brotherhood's case* (u), in which the foregoing principles were applied, in winding up a company, in favour of persons who had retired from the company in pursuance of an illegal arrangement. The persons in question had retired openly, and with the knowledge of those of the other shareholders who paid any attention to the affairs of the company, and twelve years had elapsed since the retirement. It was held that the retired shareholders were not contributories, although there was no proof that all the other shareholders were free from disability and actually knew what had taken place. This case, however, is not easily reconcileable with others (x), and is by no means universally recognised as correct. The writer, however, ventures to submit that as knowledge, and even torts and frauds, may be imputable to a company, although not to each member of it individually, so a company may be affected by

Application of
foregoing princi-
ples in winding
up companies.
Brotherhood's
case.

(s) 4 De G. & J. 158.

(t) *Ffooks v. South Western Rail. Co.*, 1 Sm. & G. 142.

(u) 31 Beav. 365, affirmed on appeal, 8 Jur. N. S. 926. See, also, *Hunt's case*, 32 Beav. 387; *Gregory v. Patchett*, 33 ib. 595.

(x) See *Stanhope's case*, L. R. 1 Ch. App. 161; *Spackman's case*, 11 Jur. N. S. 207, reversing S. C. 10 ib. 911. In *Brotherhood's case*, an appeal to the House of Lords is pending.

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Laches in enforcing agreements for partnerships.

laches, although no laches may be imputable to some of the members composing it.

The case in which the doctrine of laches is perhaps of the greatest importance, is where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain; and a court of equity will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

Cowell v. Watts.

Thus, in *Cowell v. Watts* (y) the plaintiff and the defendant had agreed to take land for the purpose of improving it, and letting it upon building leases. A long lease was accordingly obtained, and was taken in the name of the defendant. The plaintiff then applied to the defendant to enter into a written agreement upon the subject of their joint adventure, but this the defendant declined. The defendant also assumed to act as sole owner of the land obtained; he removed the plaintiff's cattle from it, and borrowed money on a mortgage of the land, and expended such money in building upon it. The plaintiff all this time did nothing, although he was aware of what was going on. After a lapse of eighteen months the plaintiff, by his solicitor, called upon the defendant to perform the original agreement; and the defendant declining, a suit for specific performance was instituted. The bill, however, was dismissed with costs, on the ground that the plaintiff had by his conduct induced the defendant to suppose that the plaintiff had abandoned the speculation, and that the defendant had the sole right to the land.

Laches where partnership is a mining partnership.

The doctrine now under discussion is especially applicable to mining partnerships. Mining operations are so extremely doubtful as to their ultimate success, that it is of the highest importance that those engaged in them should know on whom they can confidently rely for aid; if, therefore, a person

(y) 2 H. & Tw. 224.

engages in a mining adventure in partnership with others, and disputes arise between them, and he is denied a partner's rights, he should be careful to assert his claims whilst the dispute is fresh; for if he lies by until the mine has been rendered prosperous by his co-partners, and he then comes forward insisting on his rights as a partner, and seeks the assistance of a court of equity, he will be refused its aid on the ground that he has applied for it too late (z). On this principle, in *Senhouse v. Christian* (a), where several persons were lessees of a colliery, and the lease being about to expire, one of them obtained a renewal of it in his own name, Lord Rosslyn dismissed with costs a bill filed by the others claiming the benefit of the renewed lease. The plaintiffs had allowed the defendant to work the colliery single-handed at a great expense; and although they were aware of all the facts when the original lease expired, they did not take any proceedings to enforce their rights until four years afterwards. This case was referred to with approbation by Lord Eldon, in the case of *Norway v. Rowe* (b), in which he refused a motion for a receiver made on behalf of a person claiming to be a partner, but whose rights had been long denied.

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*Senhouse v.
Christian.*

Norway v. Rowe.

Again, in *Prendergast v. Turton* (c), where the capital subscribed for working a mine was spent, and the plaintiffs refused to contribute more, but the other partners did contribute more, and ultimately, after a lapse of some years, succeeded in making the mine profitable, and then the plaintiffs came forward claiming their shares in the concern, their bill was dismissed by the Vice-Chancellor Knight Bruce, and his decision was affirmed on appeal. The same doctrine was applied in the recent case of *Clegg v. Edmonson* (d), the facts of which were similar to those of *Senhouse v. Christian*, already

*Prendergast v.
Turton.*

*Clegg v. Ed-
monson.*

(z) See, in addition to the cases cited below, *Alloway v. Braine*, 26 Beav. 575, and *Walker v. Jeffreys*, 1 Ha. 341.

(a) Cited 19 Ves. 157, and reported in a note to 19 Beav. 356.

(b) 19 Ves. 144. There were more grounds than one for this decision, but the case is always re-

garded as an authority in support of the doctrine acted on by Lord Rosslyn in *Senhouse v. Christian*.

(c) 1 Y. & C. C. 98, and on appeal, 13 L. J. Ch. 238.

(d) 8 De G. Mac. & G. 787. The suit in so far as it sought for an account up to the time of dissolution was sustained.

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referred to. In two respects *Clegg v. Edmonson* goes further than the other cases; for first, the defendants had brought in no fresh capital, the mine having paid its own expenses; and secondly, although the plaintiffs had not asserted their claims by legal proceedings, they had constantly insisted on their right to participate in the profits obtained by the defendants under the renewed lease. Upon this point, however, it was observed by the Lord Justice Turner, that he could not agree to a doctrine so dangerous as that a mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded (*e*).

Effect of evidence
of abandonment.

In the cases already referred to it will be observed that there was no positive evidence that the plaintiff had ever abandoned his rights (*f*); and in *Clegg v. Edmonson* there was evidence to show that no abandonment had ever been contemplated. It need, however, scarcely to be observed that positive evidence of abandonment, in addition to the negative evidence derived from mere lapse of time during which nothing has been done by the plaintiff, greatly improves the position of his opponent.

Jekyl v. Gilbert.

There are several cases illustrating this. In *Jekyl v. Gilbert* (*g*), two artificers agreed to do work for their joint benefit; after the work was done, the person for whom it was done refused to pay; the defendant requested the plaintiff to join in legal proceedings to compel payment, but the plaintiff declined. Thereupon the defendant brought an action for payment of the work done by him, and obtained a verdict. The plaintiff then claimed half the amount recovered, but the court held that he was not entitled to any share of it.

So if a part-owner of a ship disapproves of a proposed

(*e*) This general proposition must of course be taken with reference to the case before the Court. It cannot be laid down as universally true that protests are useless. They exclude inferences which, in their absence, might fairly be drawn from the conduct of the party protesting, and are conclusive to show that no abandonment of right was intended. See in *Hart v. Clarke*,

infra, pp. 909, 910.

(*f*) In *Prendergast v. Turton* perhaps there was, and it is on the ground that there was, that Lord Chelmsford distinguished that case from *Hart v. Clarke*, which will be noticed hereafter. See 6 Ho. Lo. Ca. 657—9.

(*g*) McNaghten's Select Cases in Chancery, 29.

voyage, and arrests the ship until the other part-owners give him security for his share, he is not entitled to any portion of the profits arising from such voyage (*h*). Bk. III. Chap. 10.
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Again, where two persons agreed to take land on lease for a building speculation, and one of them afterwards opposed the prosecution of the speculation and died without ever having done anything to further it, it was held that the equitable estate and the legal estate were in the same person, viz., the survivor, and that he was not a trustee as to any portion of the land for the executors of the deceased (*i*).

McLure v. Ripley (*k*) may also be referred to as illustrating the same principle. There the plaintiff and the defendant entered into an agreement for the joint purchase of goods to be sent to China for sale, and for the investment of the proceeds in the purchase of tea on the joint account. The money necessary for the purchase of the goods was to be supplied by the plaintiff and by the defendant jointly. It was, however, agreed that the defendant should in the first instance give bills for the whole amount of the purchase-money, and that when the bills fell due the plaintiff should provide his share of their amount for the purpose of enabling the defendant to pay them. In pursuance of this agreement goods were bought and sent to China, and bills were given by the defendant. Before any of the bills became payable it appeared likely that the adventure would result in a loss, and this was known to both parties. Shortly before the time when the first of the bills became due, the defendant applied to the plaintiff for his share of the amount of the bill. The plaintiff was not prepared to supply it, and the defendant thereupon gave the plaintiff the option of withdrawing from the speculation altogether. This offer was accepted, and the plaintiff formally resigned all share in the adventure. Shortly afterwards a new agreement was come to for the purchase by the plaintiff of part of the return cargo, in which, by the preceding arrangement, the defendant alone had become interested. The cargo arrived, and it was then found that the original speculation resulted in considerable profit. The plaintiff sought to avoid his agreement to with-

*McLure v.
Ripley.*

(*h*) *Davis v. Johnstone*, 4 Sim. 539.

(*i*) *Reilly v. Walsh*, 11 Ir. Eq. 22.

(*k*) 2 Mac. & G. 275.

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McLure v.
Ripley.

draw, and his subsequent agreement for purchase, on the ground that after he had been applied to for money, and before he agreed to withdraw, the defendant had received two letters from his correspondents in China which he had concealed from the plaintiff. These two letters, however, contained nothing calculated to lead to the supposition that the adventure would be more profitable than was previously imagined, and it was clearly shown that the defendant had not been guilty of any misrepresentation. It was accordingly held that the plaintiff had no right to be relieved from his contract merely because those letters had not been communicated to him. In delivering judgment, the Lord Chancellor proceeded upon the grounds that although at first both parties were entitled to all the information relating to their joint adventure, the plaintiff, by not advancing his share of the funds when required, ceased any longer to have the rights of a partner, and that, after having agreed to embark in the speculation for better and for worse, the plaintiff had no right whatever to say to the defendant, "Give me all your information, and I will decide whether I will be a partner or not."

Cases in which
laches has not
been a bar to
relief.

It is now necessary to advert to one or two cases apparently at variance with the foregoing, and in which persons claiming the rights of partners have succeeded in obtaining the assistance of a court of equity, although their demands have been stale, and although the success of the joint adventure has been due to the exertions of those against whom those demands were made.

Lake v. Craddock.

The case of *Lake v. Craddock* (1) is sometimes referred to as one of the class now in question. But this case, in truth, only decided that if one of several partners chooses to claim the benefit of partnership dealings, after having for some time ceased to take any part in the affairs of the partnership, he must contribute his share of the outlays made by the other

(1) 3 P. W. 158. The bill in effect was filed by the plaintiff against four persons, his co-partners, for an account. One of the defendants had long ceased to take any part in the partnership affairs.

An account was decreed, and liberty was given to this defendant to come in on terms, or to be excluded. He appealed, being discontented with the terms imposed.

partners, with interest. It was not decided in *Lake v. Craddock* that a partner could, on the above terms, claim the benefit of what had been done by the others; and although the decree gave a partner who had long abandoned the concern the option of either claiming a share on proper terms, or of being excluded altogether, the other partners do not appear to have raised any objection to this option being given.

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The cases which are most at variance with those referred to in the preceding pages, are the recent cases of *Hart v. Clarke* and *Clements v. Hall*.

In *Hart v. Clarke* (m) the facts were shortly as follows,—a mining company was formed on the cost-book principle, and there was no express agreement authorising the forfeiture of shares on the non-payment of calls. The plaintiff and the defendants were lessees of the mine, and the only shareholders therein. Money being required for carrying on the mine, and the plaintiff not furnishing his proportion of the sum required, was, on more than one occasion, informed that on continued non-payment his shares would be forfeited, and ultimately they were declared forfeited. The plaintiff, who had all along denied the power of his co-adventurers to forfeit his shares, and had suggested modes of obtaining money which they had not approved, gave them notice that, in the event of the mine proving successful, he should expect his share of the profits, and should, if necessary, take legal proceedings to enforce his claim. A year and a half then elapsed, and at the end of that time he asserted his claim; and the defendants refusing to recognise it, a bill was filed for an account. The Master of the Rolls held it to be clear that no number of partners could exclude another partner and forfeit his share, but that the plaintiff was not entitled to be considered as still a partner: (1), because the notice to forfeit his share might be regarded as a notice to dissolve the partnership; and, (2), because for nearly two years, he had taken no step whatever to assert his rights, but had allowed other people to work the mine, and had only come forward when he found it had proved a profitable

Hart v. Clarke.

(m) *Clarke v. Hart*, 6 Ho. Lo. De G. Mac. & G. 232, and reversing *Ca. 633*, affirming *Hart v. Clarke*, 6 ing S. C. 19 Beav. 349.

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speculation. On appeal it was also held, that the supposed right to forfeit had no existence; but it was further held, (1), that the notice of forfeiture could not operate as a dissolution, inasmuch as that was not the object with which the notice had been given; and, (2), that, under the peculiar circumstances of the case, the plaintiff could not be held to have shown any intention to abandon the undertaking, and that the nature of mining speculations was such as to render it inequitable to lay down as a general rule that no adventurer should be entitled to relief in equity when the adventure becomes productive, unless he had paid up his calls whilst it remained unproductive.

Ground of the
decision in the
last case.

The ground of the decision in the above case, and that which distinguishes it from *Senhouse v. Christian* and other cases alluded to above, is this, viz., that the plaintiff in *Hart v. Clarke* had, as one of the lessees of the mine, a legal interest therein, which nothing had displaced. The court, therefore, was in this position: it was compelled either to make a decree in favour of the plaintiff, or to declare him a trustee of his share in the mine for the defendants; and there not being sufficient grounds for justifying the latter alternative, the former was necessarily adopted. Upon no other ground can the case, it is submitted, be distinguished from *Clegg v. Edmonson* and the other cases alluded to above; for, although reliance was placed, in the judgment in *Hart v. Clarke*, on the distinct notice given by the plaintiff that he did not acquiesce in the defendant's conduct, and should insist on his rights, it was decided in *Clegg v. Edmonson* that a protest did not enlarge the time within which redress must be sought in a court of equity (n).

Clements v. Hall.

Clements v. Hall (o) is another case in which, notwithstanding the lapse of a considerable time, it was held that relief ought to be given to a person claiming an interest in a mine; but the facts in that case were very peculiar, and four judges were equally divided, Lord Cranworth and Lord Justice Turner holding that the plaintiff was entitled to relief, whilst Lord Justice Knight Bruce and Lord Romilly were of a

(n) *Ante*, p. 906.

(o) 2 De G. & J. 173, and 24 Beav. 333.

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contrary opinion. The facts were in substance as follows. A. and B. were lessees of a mine which they worked as partners. The lease expired, but the lessees continued in possession as tenants from year to year, and worked the mine as before. In 1847 A. died, leaving C. his executor, and bequeathing an interest in the mine to D. B., after the death of A., worked the mine alone, claiming it as his own entirely, and refusing to give any account to C., who, however, constantly pressed for one. In 1850 B. negotiated for and obtained from the landlord a new lease, but on more onerous terms than before. Of this C. had no notice. After the new lease, B., who since the death of A. had only kept the mine going, began to work it in earnest and at a profit; and in 1851 D. filed a bill against B. and C. to establish his interest in the mine. C. admitted D.'s title, but B. put in no answer, and the suit was not prosecuted. In 1853 B. died and C. became his representative. In 1854 the plaintiff, who was the assignee of D.'s interest, filed a bill in the nature of a supplemental bill to D.'s former bill, and sought to have D.'s interest in the mine secured for his, the plaintiff's, benefit. C., who as the representative of A. had admitted D.'s right in his suit, now, as representative of B., opposed the plaintiff's claim, and insisted on lapse of time as a defence to the suit. But it was held, (1), that on A.'s death, his interest in the mine did not determine; (2), that his estate was entitled to share the benefit of the renewed lease; (3), that A.'s representative was not precluded in 1853 from asserting this right against B., inasmuch as B. had kept A.'s representative in ignorance of the real state of the concern; and, (4), that there had been no laches on the part of the plaintiff or of D., through whom he claimed, inasmuch as, since 1851, there had been a bill on the file to secure their interest.

Effect of recognition of title.

Lastly, on the subject of laches it may be observed that, as positive evidence of abandonment materially strengthens the case of those resisting a stale demand, so, on the other hand, positive evidence of recognition affords an answer to a defence grounded on laches and lapse of time. Thus, where a shareholder in a company became bankrupt, but his shares were carried in the books of the company to a separate account, and

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he was regularly credited with the dividends which became payable in respect of those shares, his assignees were held entitled to the shares and accumulated dividends, although twenty years had elapsed since any claim had been made to them (*p*).

Result of the
cases.

Notwithstanding *Hart v. Clarke* and *Clements v. Hall*, it is submitted that the doctrine laid down and acted upon in *Norway v. Rowe*, *Senhouse v. Christian*, *Prendergast v. Turton*, and *Clegg v. Edmonson* may still be safely relied on in all cases except those in which the court can be driven, as it was in *Hart v. Clarke*, to the alternative of holding either that the plaintiff is entitled to relief, or that he has abandoned and lost his former *legal* status.

Demurrer on the
ground of laches.

Laches, as a defence to a suit in equity, cannot be taken advantage of by demurrer, if it can only be made out inferentially from the statements in the bill; if the laches relied upon does not appear plainly and distinctly from these statements a demurrer will not lie (*q*).

4. *Of the rule not to interfere unless all proper parties are before the court.*

In considering the rules relating to parties to partnership suits it is proposed to allude, 1, to the question who ought to be parties where the number of partners is such that there is no difficulty in bringing them all before the court; 2, to the question whether, where the number of partners is so great that they all cannot be made parties, it is sufficient to have a few of them on behalf of themselves and the rest; and 3, to the extent to which public officers represent shareholders.

All persons in-
terested must be
parties.

1. *Who ought to be parties where the number of partners is not large.*—Where there is no difficulty arising from number, it is a rule in equity that no account will be decreed unless all persons interested in taking the account and within the jurisdiction of the court are, by themselves or by their trustees, parties to the suit in which the account is sought. A strong illustration of this is afforded by the case of *Hills v. Nash* (*r*),

Hills v. Nash.

(*p*) *Penny v. Pickwick*, 16 Beav. 246. See, too, the recognition of title in *Clements v. Hall*, ante, p 911.

(*q*) See *Deloraine v. Browne*, 3 Bro. C. C. 633; Mitf. Pl. 212; *Turner v. Borlase*, 11 Sim. 17.
(*r*) 1 Ph. 594.

where a bill was filed by one partner against the executors of a deceased partner, to obtain the proportion of loss due from the estate of the deceased, the whole of that loss having been paid by the plaintiff, and all the other partners having settled with him. It was objected, and held, that the other partners ought, nevertheless, to have been parties to the suit, for no settlement had been come to which was binding as between them and the defendants; no decree in the suit as framed would be binding on the absent partners; and they, notwithstanding the decree and their settlement with the plaintiff, would have a right to institute another suit against the defendants to settle the proportion of their respective contributions.

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Upon a similar principle, where a creditor of a firm seeks payment of his debt out of the estate of a deceased partner, the surviving partners must be made co-defendants with the executors of the deceased (s).

Suit against
estate of deceased
partner.

It follows from the same principle that to a suit for a dissolution and winding up of an ordinary partnership, all the partners within the jurisdiction must be parties (t); and that notwithstanding the 7th consolidated order, rule 7 (u), the representatives of deceased partners must be parties also if they have any interest in the partnership accounts (x).

Suit for dis-
solution.

But although in a suit for obtaining payment of a proportion of an unascertained sum, all the persons interested in that sum must, as a general rule, be parties, yet where the sum to be divided is ascertained, and the shares into which it is to be divided is also ascertained, a suit for the payment of one of those shares may be maintained without making the persons interested in the other shares parties (y).

Suit for share
of ascertained
sum.

(s) *Wilkinson v. Henderson*, 1 M. & K. 582. This subject will be examined hereafter.

(t) *Evans v. Stokes*, 1 Keen, 24; *Richardson v. Hastings*, 7 Beav. 301; *Harvey v. Bignold*, 8 ib. 343; *Deeks v. Stanhope*, 14 Sim. 57; *Wheeler v. Van Wart*, 9 ib. 193; *Long v. Yonge*, 2 ib. 369; *Moffat v. Farquharson*, 2 Bro. C. C. 338; *Ireton v. Lewis*, Finch, 96.

(u) As to which, see *ante*, p. 505.

(x) See *Cox v. Stephens*, 9 Jur.

N. S. 1144, and 2 N. R. 506; *Baboo Janokey Doss v. Bindabun Doss*, 3 Moo. In. App. 175, and *Cawthorne v. Chalie*, 2 Sim. & Stu. 127, where it appears that a surviving partner will, if necessary, be constituted the legal personal representative of the deceased.

(y) See *Weymouth v. Boyer*, 1 Ves. J. 416; *Smith v. Snow*, 3 Madd. 10. Compare *Hills v. Nash*, 1 Ph. 594.

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Sub-partnership.

So, where the account which is sought is one in which the partnership is not concerned, it is not necessary or proper to make all the partners parties. If, therefore, a partner has agreed to share his profits with a stranger, and the latter seeks an account of those profits, he must file his bill against that one partner alone, and not make the others parties (z).

Shares purchased
on the faith of
false statements.

Stainbank v.
Fernley.

Again, if a person has been induced by fraud to purchase shares, he is entitled to file a bill for a return of the purchase-money, and for an indemnity, and the only necessary party to such a bill is the person who sold the shares. Thus in *Stainbank v. Fernley* (a), the directors of a joint-stock company, in order to sell their shares to advantage, represented in their reports and by their agents that the affairs of the company were in a very prosperous state, and declared large dividends at a time when the affairs of the company were greatly embarrassed. A person who had been induced by those means to purchase shares of one of the directors, filed a bill against that director, praying to be repaid his purchase-money, and to be indemnified, and offering to re-transfer the shares. A demurrer for want of equity, and because all the other partners ought to have been made parties, was overruled, on the ground that the question in the suit was one with which no person was concerned except the plaintiff and the defendant.

Mare v. Malachi.

Another illustration of the same principle is afforded by the case of *Mare v. Malachi* (b). There a mining company was formed by the two defendants, who had obtained a lease of the mine proposed to be worked. The plaintiff had $\frac{2}{100}$ th shares. Some time after the mine had been worked, and, as the plaintiff alleged, at a profit, the defendants sold the mine, in order that it might be carried on by a larger company. This sale was concurred in by all the old shareholders except the plaintiff. He contended that he was entitled to adopt or reject the sale; and if he adopted it to be paid $\frac{2}{100}$ ths of the consideration for the sale; and if he rejected it, to have trans-

(z) *Brown v. De Tastet*, Jac. 284, *Raymond's case*, cited by Ld. Eldon in *Ex parte Barrow*, 2 Rose, 255; *Bray v. Fromont*, 6 Madd. 5, and see *Killock v. Greg*, 4 Russ. 285.

But see *Redmayne v. Forster*, L. R. 2 Eq. 476, a foreclosure suit.

(a) 9 Sim. 556.

(b) 1 M. & Cr. 559.

ferred to him by the defendants such a number of shares as would be equal to $\frac{2}{10}$ th shares in the original company. The bill was demurred to for want of parties, but the demurrer was overruled by L. C. Cottenham, who held, first, that the new trustees in whom the mine was vested were not necessary parties, inasmuch as the object was to have it decided to whom certain shares belonged; secondly, that the original adventurers were not necessary parties, inasmuch as they had consented to the sale of their interests, and had no further concern with the mine; and thirdly, that the new adventurers were not necessary parties, because it appeared that the sale was made to the purchasers without notice of the plaintiff's title, and that the defendants possessed in their own right, and unaffected by the claims of others, the subject-matter to which the plaintiff asserted his title. The Lord Chancellor held that, as the plaintiff's claim was not made against the corpus of the property, but against that only which, in the shape of money or shares, had come to the hands of the defendants, the objection for want of parties could not prevail. As observed by his lordship, the plaintiff's case against the defendants came to this—"If, as between you and me, the transaction is advantageous, I have a right to claim a corresponding share of the profits and purchase-money which you have received in respect of it. If not, you had no right to convert my shares into money, and I am entitled to have out of the shares in the mine now vested in you, a transfer of such a number as will be equivalent to the amount of my interest."

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The same principle was acted on in the cases of *Turner v. Hill*, *Turner v. Tyacke* and *Turner v. Borlase* (c), in each of which the assignee of a bankrupt shareholder in a cost-book mine filed a bill against one of several persons who had fraudulently purchased the bankrupt's shares, praying for an account of the profits received by such purchaser in respect of the shares he had purchased. Demurrers to these bills for want of parties, were overruled, on the ground that the only persons really interested in the matters in question in each suit, were the plaintiff and the defendant against whom the relief was

(c) 11 Sim. 1, 16, 17.

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sought. These cases go even further than *Mare v. Malachi*, inasmuch as the defendant there was the vendor of the plaintiff's shares, whereas the defendant in each of the other cases was one of several purchasers; but the purchasers were not joint purchasers, and the case against each was distinct from that against the others. Moreover, in *Turner v. Hill*, the bill prayed a receiver of the profits of the mine, but the context showed that the only receiver sought, was a receiver of the profits of the shares in question.

Bubble companies.

Again, where persons have been induced by fraud to subscribe to a bubble company, each one may institute a suit on his own behalf against those who have fraudulently obtained his money, for a return thereof; and in such a case, it is not necessary that the other persons defrauded should be parties to the suit, or be represented therein (*d*).

Fraud not on plaintiff alone.

With reference to the question of parties to suits for the rescission of contracts on the ground of fraud, the case of *Macbride v. Lindsay* (*e*) is of considerable importance. There the plaintiff had been induced by the fraudulent representations of the directors of a chartered company to become a member of the company, and he filed a bill against the company and its directors, praying for, amongst other things, a return of all monies paid by him to the company, with interest, and for an injunction to restrain the making of further calls upon him, and for an indemnity against any liability in respect of the engagements of the company. A demurrer to this bill was allowed, on the ground that the fraud of which the plaintiff complained gave him no right to rescind his contract, except a right common to himself and others who were not represented in the suit. This case appears to the writer extremely difficult to reconcile with others in which false prospectuses have been issued, but in which nevertheless one shareholder has successfully maintained a suit against a company and its directors for a rescission of his contract to take shares (*f*).

Observations on
Macbride v.
Lindsay.

(*d*) *Colt v. Woollaston*, 2 P. W. 154; *Green v. Barrett*, 1 Sim. 45; *Blain v. Agar*, 2 Sim. 219; *Cridland v. De Mauley*, 1 De G. & S. 459.

(*e*) 9 Ha. 574. See, also, *Seddon v. Connell*, 10 Sim. 58.

(*f*) See, for example, *Kisch v. Central Railway of Venezuela*, 3 De G. J. & Sm. 122, and *Smith v.*

Whether in a suit against the executor of a partner to make him account for profits made by wrongfully employing the assets of the deceased in the business of a firm of which the executor is a member, it is necessary to make the other members of the firm parties, seems to be open to some doubt; for, whilst in one recent case it was intimated that to such a suit they were necessary parties, in another recent case, it was held that they were not, and the two cases seem undistinguishable with reference to this point (*g*). The latter, however, the writer submits to be correct.

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Suits against
executors for
account of
profits.

But although a person may have no interest in the account to be taken, and would therefore be an improper party to a mere bill for such account, yet, if an injunction is sought to be obtained against him specially, he must be made a party. For this reason, the Bank of England and Sheriffs are often made parties to suits in which they have no real interest (*h*).

Effect of praying
injunction.

2. *Where some partners may sue or be sued on behalf of themselves and others.*—It has been held in many cases, that to a bill praying for a dissolution of a partnership, all the partners, however numerous, are necessary parties, and that consequently, a bill filed by some on behalf of themselves and others, and praying for a dissolution, is bad on demurrer (*i*). This rule is supposed to admit of no exception, and it has, though with expressions of regret, been held to apply to unincorporated companies as well as to ordinary partnerships (*k*). The reason given for the rule is, that the affairs of a partnership cannot

Some on behalf
of themselves
and others.

Suits for dis-
solution.

Reese River Co., L. R. 2 Eq. 264, noticed *infra*, under the head rescission of contract. As to suits in such cases by one shareholder on behalf of himself and others, see *Croskey v. Bank of Wales*, 4 Giff. 314, noticed *infra*, p. 925. *Macbride v. Lindsay* on the one hand, and *Croskey v. Bank of Wales* on the other, are certainly embarrassing.

(*g*) Compare *Simpson v. Chapman*, 4 De G. Mac. & G. 154, and *McDonald v. Richardson*, 1 Giff. 81.

(*h*) See, for example, *Vulliamy v. Noble*, 3 Mer. 593; *Bevan v. Lewis*,

1 Sim. 376.

(*i*) *Evans v. Stokes*, 1 Keen, 24; *Richardson v. Hastings*, 7 Beav. 301; *Harvey v. Bignold*, 8 ib. 343; *Deeks v. Stanhope*, 14 Sim. 57; *Wheeler v. Van Wart*, 9 Sim. 193; *Long v. Yonge*, 2 Sim. 369; *Ireton v. Lewis*, Finch, 96; *Moffat v. Farquharson*, 2 Bro. C. C. 338.

(*k*) See cases in last note and *Van Sandau v. Moore*, 1 Russ. 441; and *Davis v. Fisk*, in Farren on Life Assurances, and cited by counsel in Younge's reports, p. 425.

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Presence of public officer not sufficient.

No instance of decree for dissolution where all the partners were not before the court.

Cockburn v. Thompson.

be finally wound up and settled without deciding all questions arising between all the partners, which cannot be done in the absence of any one of them (*l*).

Even if a partnership is empowered to sue and be sued by a public officer, his presence is not, in a suit for a dissolution, equivalent to the presence of all the partners (*m*).

But notwithstanding these numerous authorities, it may be permitted to doubt whether it can be considered as a rule admitting of no exception whatsoever, that to every bill praying for a dissolution, all the partners must individually be parties. All that can on principle be requisite, is that every conflicting interest shall be substantially represented by some person before the court. If, which is possible, the interest of each partner conflicts with that of all the others, then all must undoubtedly be parties. But if the partners are numerous, and it can be shown that they are divisible into classes, and that all the individuals in each class have a common interest, then, although the interest of each class conflicts with that of every other class, there seems to be no reason why, if each class is represented by one or two individuals composing it, a decree for a dissolution should not be made conformably with the ordinary doctrines of the court of equity (*n*). There is not, however, so far as the writer is aware, any case in which a decree for a dissolution has actually been made in the absence of any of the partners. There is, it is true, one case in which a bill by some on behalf of themselves and others, praying expressly for a dissolution, was upheld; but the point now in question was not discussed. The case referred to is *Cockburn v. Thompson* (*o*). There a company had proved abortive, and a resolution to dissolve had been made. A bill was filed by several proprietors on behalf of themselves and all the other proprietors, against the solicitor and the bankers of the company, and it prayed, *inter alia*, that the institution might be

(*l*) See *Richardson v. Hastings*, Sim. 58.
7 Beav. 307.

(*m*) See *Van Sandau v. Moore*, 1 Russ. 441; *Davis v. Fisk*, cited in You. 425; *Abraham v. Hannay*, 13 Sim. 581; *Seddon v. Connell*, 10

(*n*) See *Richardson v. Larpent*, 2 Y. & C. C. 514, and the observations of Lord Cottenham in *Walthworth v. Holt*, 4 M. & Cr. 635.

(*o*) 16 Ves. 321.

declared dissolved; that an account might be taken of the monies received by the defendants on behalf of the proprietors; and that the rights and interests of the plaintiffs and other proprietors might be declared and established. An objection was taken for want of parties, but was disallowed by Lord Eldon. In this case, however, the real object was to make the defendants account for the money they had received; it does not appear from the report that the defendants were proprietors in the concern, and it is clear that the question as to want of parties was not raised with reference to that part of the prayer of the bill which sought a dissolution. The case cannot, therefore, be considered either as opposed to the numerous authorities already cited (*p*), or to be an illustration of the principle that some may represent others in a suit for a dissolution.

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In a suit not praying for a dissolution, the question of parties turns entirely on the nature of the right sought to be enforced. If an account is required, and it is one in which the interest of *each* partner is distinct from and in conflict with that of *all* the others, then all the partners, however numerous, must be parties, and their representation by others, or by a public officer or secretary, will not be sufficient (*q*). On the other hand, if there are no such conflicting interests as above supposed, it will be sufficient if each distinct interest is represented by a party to the record.

Suit not in terms
seeking a dis-
solution.

It was held in *Walworth v. Holt* (*r*), that where partners are too numerous to be brought before the Court, and they are divisible into classes, and all the individuals in one class have a common interest, a suit instituted by a few individuals of that class on behalf of themselves and all the other individuals of the same class against the other members of the company, is sustainable. Since this decision, there have been many suits

Walworth v.
Holt.

(*p*) See in *Long v. Yonge*, 2 Sim. 380, *per* V.-C. Shadwell.

(*q*) See *Van Sandau v. Moore*, 1 Russ. 441; *Seddon v. Connell*, 10 Sim. 58; *Abraham v. Hannay*, 13 ib. 581; *McMahon v. Upton*, 2 ib. 473; *Sibley v. Minton*, 27 L. J. Ch. 53, V.-C. Kindersley.

(*r*) 4 M. & Cr. 619. *Cockburn v. Thompson*, 16 Ves. 321, *ante*, p. 918, is an earlier decision on this point. See, too, *Good v. Blewitt*, 13 Ves. 397. See as to some on behalf, &c. in cases of voluntary societies assuming to be corporations, *Lloyd v. Loaring*, 6 Ves. 773.

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by some shareholders on behalf of themselves and others, praying for very general accounts (but studiously avoiding a prayer for a dissolution), and such suits have been successful whenever the interest of the absent partners has been the same as that of the plaintiffs on the record.

Apperley v. Page.

For example, it was held in *Apperley v. Page* (s), that a bill might be filed by some of the shareholders of a provisionally registered railway company on behalf of themselves and all the other shareholders, except the defendants, against the directors; although the bill prayed not only for the collection of the joint property and its application in discharge of the joint liabilities, but also for the distribution of the surplus amongst the shareholders (t).

Suits not seeking
division of
assets.

When no dissolution is prayed, and no winding-up of the partnership is sought, a suit may be properly instituted by some of a number of numerous partners, on behalf of themselves and all others whose interest is identical with their own; and this form of suit is constantly adopted where numerous partners seek to make their managers account for secret benefits and advantages obtained by them in breach of the good faith owing to those whose affairs they conduct (u); or to rescind contracts into which the partnership has been induced to enter by false and fraudulent representations (x). So in the case of mutual insurance societies and friendly societies one member may sue the trustees or committee, and one of each class of members as representing all the other members, where the object of the suit is to obtain payment of what is due to the plaintiff (y).

Suits to restrain
directors from
improper acts.

Again, for the purpose of rescinding an agreement illegally entered into by the directors of an unincorporated company, or

(s) 1 Ph. 779. Compare *Sibson v. Edgeworth*, 2 De G. & Sm. 73.

2 K. & J. 463.

(t) See for other instances, *Wilson v. Stanhope*, 2 Coll. 629; *Harvey v. Collett*, 15 Sim. 332; *Cooper v. Webb*, ib. 454; *Clements v. Bowes*, 17 Sim. 167, and 1 Drew. 684; *Richardson v. Hastings*, 7 Beav. 323; *Butt v. Monteaux*, 1 K. & J. 98; *Sheppard v. Oxenford*, ib. 491; *Sibson v. Edgeworth*, 2 De G. & S. 73. Compare *Williams v. Salmond*,

(u) *Chancey v. May*, Prec. in Ch. 592; *Hichens v. Congreve*, 4 Russ. 562; *Taylor v. Salmon*, 4 M. & Cr. 134; *Beck v. Kantorowicz*, 3 K. & J. 237.

(x) See *Small v. Attwood*, You. 407.

(y) See *Pare v. Clegg*, 29 Beav. 589; *Bromley v. Williams*, 32 ib. 177; *Harvey v. Beckwith*, 2 Hem. & M. 429.

for the purpose of restraining them from doing that which is illegal, a suit may be instituted by one shareholder on behalf of himself and all the others, except the defendants, against those directors. Thus, in *Gray v. Chaplin* (z), it was held that one of the shareholders of a company was entitled to file a bill on behalf of himself and other shareholders, to set aside an agreement entered into by the managers, contrary to the company's act of Parliament; because whatever benefits might be reserved to the shareholders by the agreement, they were all to be considered as interested in having the directions of the act complied with.

Upon the same principle, it has been held in more modern cases, that bills by some shareholders in incorporated companies, on behalf of themselves and other shareholders, against the companies of which they are members, and the directors of those companies, for the purpose of preventing or annulling illegal acts, contemplated or performed by the directors, are proper in point of form. In suits so constituted, courts of equity have compelled directors to account for monies improperly applied (a); have declared resolutions fraudulent and void (b); have restrained the carrying out of agreements under the seal of the company (c); restrained the application of the funds of a company to unauthorised purposes (d); restrained the construction of part of a railway instead of the whole of it (e); restrained the improper declaration of dividends (f);

(z) 2 Sim. & Stu. 267, reversed on appeal, on the ground of delay and acquiescence, 2 Russ. 126, noticed *ante*, p. 901.

(a) *Bryson v. Warwick Canal Co.*, 4 De G. Mac. & G. 711.

(b) *Preston v. Grand Collier Dock Co.*, 11 Sim. 327.

(c) *Maundsell v. Midland Great Western (Ireland) Rail. Co.*, 1 Hem. & M. 130.

(d) *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1; *Salomons v. Laing*, 12 Beav. 339 and 377; *Munt v. Shrewsbury and Chester Rail. Co.*, 13 Beav. 1; *Bagshaw v. Eastern*

Union Rail. Co., 7 Ha. 114, and 2 Mac. & G. 389; *Simpson v. Denison*, 10 Ha. 51; *Vance v. East Lancas. Rail. Co.*, 3 K. & J. 50.

(e) *Cohen v. Wilkinson*, 12 Beav. 125, and 1 Mac. & G. 481; *Hodgson v. Powis*, 12 Beav. 392 and 529, and 1 De G. Mac. & G. 6.

(f) *Dumville v. Birkenhead, &c., Rail. Co.*, 12 Beav. 144; *Carlisle v. South Eastern Rail. Co.*, 1 Mac. & G. 689; *Henry v. Great Northern Rail. Co.*, 4 K. & J. 1, and 1 De G. & J. 606. As to suits to restrain the payment of dividends actually declared, see *infra*, p. 924.

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Company and
directors proper
party in such
cases.

Suits by some on
behalf to control
a majority.

restrained the transfer of the business of one company to another company (*g*); restrained loans to directors (*h*). Further, it is possible for a suit by one member on behalf of himself and others to be maintainable, where a suit with like objects would fail if instituted by the company in its corporate capacity; *e. g.*, where the complaint is of fraud imputable to the company as a body, but not imputable to the members individually (*i*).

In such cases as the foregoing, the company, as such, is a proper party, because it is the company, as such, which is sought to be affected by the decree of the Court (*k*); and the directors individually are proper parties, because they are the persons to be affected in the first instance, and some decree against them personally is also usually necessary. If, however, a decree against the company is all that is required, there is no necessity to make the directors parties individually. Thus, where a suit was instituted for the purpose of preventing a company from delegating its powers and, in fact, transferring its business to another company, a bill by one of the shareholders in the first company, on behalf of himself and all the other shareholders therein against both companies, was held proper in point of form, although none of the directors of either company were parties in person (*l*).

The cases above referred to show that it is competent for one shareholder to institute a suit on behalf of himself and co-shareholders, for the purpose of obtaining relief in respect of illegal acts done or contemplated by directors; but courts of equity will not interfere in suits so constituted, if the relief sought is in respect of acts the legality or illegality of which depends on the voice of a majority of the shareholders (*m*). If

(*g*) *Beman v. Rufford*, 1 Sim. N. S. 550; *Charlton v. Newcastle and Carlisle Rail. Co.*, 5 Jur. N. S. 1096; *Hare v. London and N. W. Rail. Co.*, 1 J. & H. 252, which shows that the company which has agreed to take the business ought to be a party.

(*h*) *Bluck v. Malalue*, 27 Beav. 398.

(*i*) See the observations of Lord Cottenham in *Vigers v. Pike*, 8 Cl.

& Fin. 647, 648.

(*k*) See *Bagshaw v. The Eastern Union Rail. Co.*, 7 Ha. 114.

(*l*) *Winch v. The Birkenhead, Lanc. and Chesh. Rail. Co.*, 5 De G. & Sm. 562.

(*m*) *Foss v. Harbottle*, 2 Ha. 461; *Mozley v. Alston*, 1 Ph. 790; *Lord v. The Governor and Co. of Copper Miners*, 2 Ph. 740; *Bailey v. The Birkenhead, Lancas., and Cheshire Junction Rail. Co.*, 12 Beav. 433;

such last mentioned acts are sanctioned by the majority, the Court cannot interfere at all, and if they are not so sanctioned, the majority should themselves apply to the Court, and institute proceedings in the name of the company (*n*). If it is thought necessary to institute a suit before the views of the majority are known, or if the majority are too indifferent to take any proceedings to enforce obedience to their own resolutions, the proper course to be taken by those who determine to appeal to the Court is to take upon themselves the responsibility of filing a bill in the name of the company. Such a bill will not be taken off the file unless it appears that the majority disapprove of it (*o*).

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When a bill is filed by some shareholders on behalf of themselves and others, it must appear in the bill, (1), that the plaintiffs are shareholders (*p*); and, (2), that they are suing on behalf of themselves and others. If this last does not appear, the suit will be treated as that of the ostensible plaintiffs alone, and be dismissed if others ought to be parties, either actually or by representation (*q*).

Frame of bill
by some on
behalf, &c.

Moreover, if there are conflicting interests, care must be taken to have each separate interest substantially represented by some person who is a party to the suit. Therefore, where there is a dispute about a call which some shareholders have paid and others have not, those who have not paid cannot sustain a bill on behalf of themselves and those who have paid, against the directors, trustees, and secretary of the company, praying for a general account of the partnership debts and assets, and to have the property of the concern applied in

Conflicting
interests.
Suits to restrain
calls.

Browne v. The Monmouthshire Rail. and Canal Co., 13 Beav. 32; *Kent v. Jackson*, 14 Beav. 367, and 2 De G. Mac. & G. 49; *Inderwick v. Snell*, 2 Mac. & G. 216; *Edwards v. The Shrewsbury and Birm. Rail. Co.*, 2 De G. & Sm. 537; *Yetts v. The Norfolk Rail. Co.*, 3 ib. 293; *Stevens v. The South Devon Rail. Co.*, 9 Ha. 313. See *ante*, p. 894, *et seq.*

(*n*) *Mozley v. Alston*, 1 Ph. 790.

(*o*) *The Exeter and Crediton Rail.*

Co. v. Buller, 5 Ra. Ca. 211, where the bill was filed in the name of the company, although the defendants had possession of the seal. See, also, *East Pant du, &c., Mining Co. v. Merryweather*, 2 Hem. & M. 254.

(*p*) *Banks v. Parker*, 16 Sim. 176; *Walburn v. Ingilby*, 1 M. & K. 61.

(*q*) *Baldwin v. Lawrence*, 2 Sim. & Stu. 18; *Cooper v. Powis*, 3 De G. & S. 688.

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Suits to restrain
payment of
dividends.

discharge of its liabilities. To a suit with such objects, some at least of the class of shareholders who have paid the call ought to be made parties (*r*); although if they are not known to the plaintiff, and the bill so alleges, a demurrer for want of parties will not be allowed (*s*). Again, with respect to suits to restrain the improper payment of a dividend, it is to be remembered that the declaration of a dividend enables each shareholder to sue at law for so much of it as he is entitled to; and consequently, even although the dividend may have been improperly declared, payment of it will not be restrained in a suit by one shareholder against the company and its directors only. On these grounds, in *Carlisle v. South-Eastern Railway Company*, an injunction to restrain the payment of a dividend already declared was refused, although an injunction to restrain the future declaration of dividends, except out of profits, was granted (*t*).

Identity of in-
terests.

These cases are sufficient to show that, in order that a suit may be sustainable by one or more persons on behalf of themselves and others, it is essential that the interests of the plaintiffs on the record, and of those others whom they assume to represent, should be, in a judicial point of view, identical, and be proved to be so by the plaintiffs (*u*). Consequently a shareholder in a company who has sold his shares, and has no longer any interest in the company, cannot sustain a suit on behalf of himself and the other shareholders for an account of the dealings and transactions of the company or of its directors, and to have its assets applied in discharge of its liabilities.

(*r*) See *Richardson v. Larpent*, 2 Y. & C. C. 507; *Lovell v. Andrew*, 15 Sim. 581; *Sharpe v. Day*, 1 Ph. 771; *Lund v. Blanshard*, 4 Ha. 9; and see *Seddon v. Connell*, 10 Sim. 58, and *Abraham v. Hannay*, 13 ib. 581, as to the insufficiency of the public officer in such cases.

(*s*) *Hodgkinson v. National Live Stock Insurance Co.*, 26 Beav. 473, and 4 De G. & J. 422.

(*t*) *Carlisle v. South Eastern Rail. Co.*, 1 Mac. & G. 689. See, also, *Fawcett v. Laurie*, 1 Dr. & Sm.

192.

(*u*) See, further, *Clay v. Rufford*, 8 Ha. 281; *Williams v. Salmond*, 2 K. & J. 463; *Sibson v. Edgworth*, 2 De G. & S. 73, in which case the defendant pleaded that the interests of the plaintiff and those he assumed to represent, were not identical. See, also, *Thomas v. Hobler*, 8 Jur. N. S. 125, which shows that if the plaintiff makes an alternative case, neither alternative must be opposed to the interests of those whom he assumes to represent.

ties. For, whether he is or is not still under liabilities from which he is entitled to be freed, he has no right, having sold all his interest in the company, to assume to represent those with whom he has no longer anything to do (*x*). Upon the same principle it has been said, that a shareholder who is a mere trustee, having no beneficial interest in the company, is not a proper person to file a bill on behalf of himself and other shareholders (*y*).

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Neither can a suit by one shareholder on behalf of himself and others be maintained by a person who does not honestly represent the interests of his co-shareholders, but who is the nominee of a rival company (*z*).

Plaintiff a
nominee of a
rival company.

Further, it was laid down by Lord Eldon that a suit by one person on behalf of himself and others was not sustainable unless the injury of which he complained was such as to give him and them a right to sue jointly, and that it was not sufficient that each should have a right to sue separately. And in strict conformity with this principle that eminent judge decided that if persons having no previous connection with each other have been induced to subscribe to a loan by fraud, a suit by one of them on behalf of himself and others to obtain a return of their subscriptions cannot be sustained; for although each subscriber may be entitled to have his money back, the subscribers have no joint right of action (*a*). This principle appears to be applicable where persons have been induced by false and fraudulent prospectuses, reports, and other announcements, to subscribe for shares in a company; and in a very recent case it was held that a bill by one subscriber on behalf of himself and others for a return of their subscriptions on the ground of fraud, was demurrable (*b*). But in a previous case the contrary had been decided (*c*); it being considered that the subscribers to a company have such a community of interest in

Joint right of
action.

Suits for re-
covery of sub-
scriptions in
cases of fraud.

(*x*) *Doyle v. Muntz*, 5 Ha. 509.

(*y*) *Ibid.*, *sed quære*.

(*z*) *Forrest v. Manchester, &c., Rail. Co.*, 7 Jur. N. S. 887, L. C. See, also, *Hare v. London and North Western Rail. Co.*, 1 J. & H. 252, and *Thomas v. Hobler*, 8 Jur. N. S. 125, L. C.

(*a*) *Jones v. Garcia del Rio*, Turn. & Russ. 297.

(*b*) *Croskey v. Bank of Wales*, 4 Giff. 314.

(*c*) See *Beeching v. Lloyd*, 3 Drew. 314, where the demurrer was overruled. This case, although prior to the last, was not cited in it.

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Further observa-
tions on suits by
some on behalf.

the funds subscribed as to entitle them to sue jointly for their return (*d*). The law, therefore, upon this point must be considered as still open to discussion (*e*).

A suit by one or more persons on behalf of themselves and others, may be instituted without the consent of such others (*f*); and even against their consent if the object of the suit is to prevent or obtain redress in respect of an illegal act (*g*). But a suit by one or more on behalf, &c., is the suit of those who are named on the record as plaintiffs, and whatever is a defence as against them is a defence to the suit, whatever might have been the case if other persons had been plaintiffs on the record (*h*). Where the suit is instituted by one member of a company on behalf of himself and others for the protection of the funds of the company and the suit is successful, the plaintiffs are only entitled to their costs as between party and party, although in one sense the funds out of which those costs are to be paid belong to the plaintiffs themselves (*i*).

Accounts taken in a suit by one shareholder on behalf of himself and others bind all of them (*j*).

It seems that unless there are twenty persons at least whose interests are the same, one or more of them will not be allowed to represent the others (*k*).

Misjoinder of
plaintiffs.

Before quitting this part of the subject, it is necessary to notice an important statutory enactment relating to the mis-

(*d*) See the last note.

(*e*) The following cases may be usefully referred to on this head: *Cridland v. De Manley*, 1 De G. & S. 459; *Macbride v. Lindsay*, 9 Ha. 574; *Seddon v. Connell*, 10 Sim. 58; *Bryson v. Warwick, &c., Canal Co.*, 4 De G. Mac. & G. 711; *Moseley v. Cressey's Co.*, L. R. 1 Eq. 405; *Blain v. Agar*, 2 Sim. 289.

(*f*) *Burt v. British Nation Insur. Co.*, 5 Jur. N. S. 555, V.-C. Stuart, affirmed on appeal, 4 De G. & J. 158; *Williams v. Salmond*, 2 K. & J. 463.

(*g*) *White v. Carmarthen Rail. Co.*, 1 Hem. & M. 786. Compare

Lund v. Blanshard, 4 Ha. 299.

(*h*) *Burt v. British Nation Insur. Co.*, *ubi supra*, where the plaintiff was held barred by his own acquiescence in the matters complained of. See, too, *Scarth v. Chadwick*, 14 Jur. 300, V.-C. E., where the defendants got rid of the suit by paying the plaintiff all that he was entitled to.

(*i*) *Morgan v. Great Eastern Rail. Co.*, 1 Hem. & M. 560.

(*j*) See *Singleton v. Selwyn*, 9 Jur. N. S. 1149.

(*k*) See *Harrison v. Stewardson*, 2 Ha. 530.

joinder of parties. Formerly, if a bill was filed by some on behalf of themselves and others, and it turned out that any of the persons thus included as plaintiffs had no right to sue, or had interests conflicting with that of the plaintiffs on the record, the bill was dismissed (*l*); but now the Court has power to grant relief and to modify its decree according to the special circumstance of the case, and for that purpose to direct amendments, and to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants to the suit, and the remaining plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record (*m*). Accordingly, in a recent case where a bill was filed by one shareholder on behalf of himself and others, and it appeared that the interest of some of the persons thus represented was different from that of the plaintiff, the Vice-Chancellor Kindersley held that the absent plaintiffs might be treated as defendants; and an account was decreed, with liberty for certain shareholders to attend in chambers (*n*).

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3. *Of suits by and against public officers.*—Upon the ground that the public officer of a company only represents the shareholders as a collective whole, and not any one or more of them as against the others (*o*), it was twice held by Lord Eldon, that a suit for the dissolution of a company empowered to sue and be sued by its secretary, was defective for want of parties, although the suit was instituted by one shareholder on behalf of himself and others, against the secretary and the directors of the company (*p*). In tracing the history of joint-stock companies in the celebrated case of *Van Sandau v. Moore*, Lord Eldon prominently alluded to the inability of a public officer to represent the company in suits between its members (*q*), and this doctrine was carried out to its full extent in

Representation
of parties by
public officers.

(*l*) In *Spittal v. Smith*, Tambl. 45, the bill was dismissed as to some of the plaintiffs only.

(*m*) 15 & 16 Vict. c. 86, § 49.

(*n*) *Clements v. Bowes*, 1 Drew. 684. See, too, *per* L. J. Turner in *Sturge v. The Eastern Union Rail. Co.*, 7 De G. Mac. & G. 180, 181. See, also, *Jones v. Rose*, 4 Ha. 52,

where it was held that such a bill might be amended by making it the bill of the plaintiff alone.

(*o*) See *ante*, p. 858.

(*p*) *Davis v. Fisk*, cited in You. 425; and *Van Sandau v. Moore*, 1 Russ. 441.

(*q*) See 1 Russ. 460 and 472, and *Hichens v. Congreve*, 4 Russ. 562.

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McMahon v.
Upton.

Seldon v. Con-
nell.

Abraham v.
Hannay.

Conclusions from
the cases.

the three following cases decided by the late Vice-Chancellor Shadwell.

In *McMahon v. Upton* (r) the public officer of a mining company sued a person, who was both a member of the company and its agent for selling shares, for an account of what he had received as agent; and a demurrer to the bill was allowed on the ground that the actions and suits in which the officer was to be regarded as the representative of the company were actions and suits between the company and persons not members of it. In *Seldon v. Connell* (s) a bill was filed by a *de facto* member of a banking company (formed under the act of 7 Geo. 4, c. 46), for the purpose of rescinding, on the ground of fraud, the agreement by which he became a member. The public officer of the company was made a defendant, but a demurrer by him was allowed, on the ground that neither the act of 7 Geo. 4, c. 46, nor the subsequent act of 1 & 2 Vict. c. 96, empowered the public officer to represent all the members of the company except one, in a suit between him and them as members. In the still later case of *Abraham v. Hannay* (t), a suit instituted by a member of a banking company against its public officer and directors, and seeking in effect a dissolution and winding up of the company, was held defective for want of parties upon the same principle.

But, notwithstanding the above cases, and the observations of Lord Eldon, a suit may be instituted by the public officer of a company against some of its members, if the question in dispute is one between the company as a collective whole, on the one side, and those individual members on the other; and it has accordingly been held that, under the Joint-stock banking act, 7 Geo. 4, c. 46, it is competent for a public officer of a company governed by that act, to sue the directors of the company for the purpose of making them account for breaches of trust and mismanagement; and that in such a suit none of the shareholders need be parties, although the company has ceased to carry on business, except for the purpose of winding up its affairs (u).

(r) 2 Sim. 473. Compare *Harrison v. Brown*, 5 De G. & Sm. 728.

(s) 10 Sim. 58.

(t) 13 Sim. 581.

(u) *Harrison v. Brown*, 5 De G. & Sm. 728.

2. *Rescission of contract for fraud.*

A partnership which a person has been induced to enter into by the fraud and misrepresentation of his co-partners will be dissolved at his instance; and those who inveigled him into joining them will be decreed to repay him whatever he may have paid them, with interest, and to indemnify him against all claims and demands to which he may have become subject by reason of his having entered into partnership with them, he on the other hand accounting to them for what he may have received since his entry into the concern (x). The partner defrauded may, at his option, insist upon the rescission of the contract into which he has been inveigled, or he may adopt that contract and enforce it as if it were untainted by fraud (y).

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Effect of fraud
on contract of
partnership.

But it is by no means every mis-statement made to a person entering into a contract and referring to its subject matter which confers upon him a right to rescind it. If the misrepresentation is made by a stranger to the contract, no right to rescind arises: the person defrauded must seek redress against him of whose fraud he complains. If the misrepresentation is made by a party to the contract, still, in order to render the contract invalid, the representation must be, and be clearly proved to be, material with reference to the contract, and to have occasioned the contract: in other words, the misrepresentation must be one on which the person seeking to rescind the contract relied when he entered into it, and in the absence of which it is reasonable to infer that he would not have entered into it at all. If the representation is not of this

Nature of mis-
representation
giving a right
to rescind a
contract.

(x) See *Pillans v. Harkness*, Colles Parl. Ca. 442; *Ex parte Broome*, 1 Rose, 71, and 1 Coll. 598, note; *Hamil v. Stokes*, Dañ. 20, and 4 Price, 161; *Stainbank v. Fernley*, 9 Sim. 556; *Jauncey v. Knowles*, 8 W. R. 69. *Clifford v. Brooke*, 13 Ves. 131, was not a case of this class; the plaintiff there sought to recover money which he had paid, not for the admission of

himself, but for the admission of his brother into partnership with the defendants. The plaintiff's remedy under these circumstances was held to be by an action at law.

(y) *Small v. Attwood*, You. 507; *Pulsford v. Richards*, 17 Beav. 87; *Cruikshank v. McVicar*, 8 Beav. 106. And see *Beck v. Kantorowicz*, 3 K. & J. 230, and cases of that class noticed ante, pp. 588—592.

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Private arrange-
ments by pro-
motors.

Pulsford v.
Richards.

nature, the remedy, if any (z), of the person aggrieved is to have the mis-statement made good, and not to avoid his own act, unless indeed compensation cannot be obtained. This is well illustrated by *Pulsford v. Richards*, *Jennings v. Broughton*, and *Robson v. The Earl of Devon*.

In *Pulsford v. Richards* (a), the projectors of a Belgian railway issued a prospectus for the formation of a company, stating that they transferred to the company the concession obtained from the Belgian government, and all the benefits arising from it, subject to certain specified reservations in favour of the promoters for reimbursement of preliminary expenses. The plaintiff, acting on the faith of this prospectus, applied for and accepted shares in the company, but afterwards filed a bill against the projectors for a return of all monies paid by him in respect of such shares with interest, offering to return the shares and all dividends received on account of them. The grounds on which the plaintiff sought to rescind his contract were substantially—(1), that an arrangement had been made by the promoters, with an engineer highly beneficial to him and detrimental to the company, and that this arrangement was in no way alluded to in the prospectus; and, (2,) that the promoters had appropriated to themselves 20,000 shares in the company, in addition to the benefits expressly reserved to them in the prospectus. The Court however held that there was no such fraud as was sufficient to enable the plaintiff to rescind the contract into which he had entered, and his bill was dismissed with costs. As regards the shares, the Court was of opinion that the directors took the shares *bonâ fide*, and that the number of shares allotted by them to themselves and the engineer, was not a fact so material, that the knowledge of it was a matter which the directors were bound to communicate to the public, in order to enable them to come to a sound conclusion as to the probable success of the undertaking in which they were invited to take a part. As to the concealed arrangement with the engineer, the Court came to the conclusion that the services performed and to be performed by him, must have been

(z) As to whether there is any 2 Cox, 124.
remedy, see *Merryweather v. Shaw*, (a) 17 Beav. 87.

performed by some one; that he was peculiarly well fitted to perform them; that supposing the remuneration agreed upon to have been excessive, still that would only entitle the shareholders to have the amount of excess paid by the directors themselves, and that the non-disclosure to the public of the agreement made with the engineer, was not the suppression of a fact which affected the intrinsic value of the undertaking, or consequently afforded a sufficient ground for a rescission by the plaintiff of his contract to take shares in the company.

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In *Jennings v. Broughton* (b), the plaintiff, who had taken shares in a mining company formed by the defendants, sought to rescind the contract on the ground that he had been induced so to do, by their misrepresentations. The misrepresentations consisted of exaggerated statements, as to the value and prospects of the mine, contained in the report of an engineer employed by the defendants, and which report was submitted by them to the plaintiff. The plaintiff, however, did not altogether rely on this report, but went and examined the mine himself more than once, before he purchased the shares in it. The mine had undoubtedly been described in too glowing colours, and it by no means came up to the expectations formed of it; but the Court was of opinion, upon the evidence, that the plaintiff had not relied on what was represented to be actually existing, that he not only had had the same means as the defendants of ascertaining the truth, but that he had availed himself of those means, and that his deception was as much owing to his own error of judgment as to anything else. His bill therefore was dismissed, and with costs, and an appeal by him was also dismissed.

Statements not
relied on by
plaintiff.

Jennings v.
Broughton.

In *Robson v. The Earl of Devon* (c), the plaintiff, a stock-broker, was induced by the secretary of a company, first to advance him 500*l.* on the security of 1000 *l.* shares, on each of which *l.* was certified to have been paid up; and secondly, to purchase 1200 other shares. On the failure of the company,

Prospectus not
relied upon by
plaintiff.

Robson v.
Devon.

(b) 17 Beav. 234, and 5 De G. Mac. & G. 126. See, also, *Small Attwood*, 6 Cl. & Fin. 232, where the plaintiff also relied on his own

judgment.

(c) 3 Jur. N. S. 567, and 4 ib. 245.

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the plaintiff sought to have both transactions declared void, and to obtain back from the company his 500*l.*, and the money paid for the purchased shares. The plaintiff rested his case against the company upon the following, amongst other grounds, viz.: First, that the company's prospectus showed that no shares ought to have been issued before a certain amount of capital had been subscribed; and secondly, that nothing had ever been paid in respect of the shares on which the 500*l.* had been advanced. But it was held that the plaintiff was entitled to no relief on either of these grounds. For, first, it was by no means clear that the capital required by the prospectus to be subscribed, had not in fact been subscribed; secondly, the plaintiff had not parted with his money on the faith of the prospectus, so that it was immaterial to consider what was there stated; and thirdly, the shares on the security of which he lent his money, were, as between the holder and the company, to be taken as paid-up shares, and therefore it was of no consequence to the plaintiff, whether anything had actually been paid upon them or not.

Exaggerated description.

Nor will the mere circumstance that the prospectus of a company sets forth the value of the proposed undertaking in too glowing colours, enable a person to rescind a contract to take shares entered into on the faith of the statements contained in the prospectus. Contracts cannot be rescinded simply on the ground that sanguine expectations have been expressed by one person, and raised in the mind of another, and not been ultimately realised. In a recent case, a company was formed to work a patent, the value of which was grossly overstated in the prospectus. It was held that a person taking shares on the faith of such prospectus could not afterwards repudiate them (*d*).

Fraud must be clearly proved.

Again, the fraud relied upon as a ground for rescinding the contract must be clearly proved; and if there has been no positive misrepresentation and no intentional concealment, the circumstance that the plaintiff was in fact misled by what he was told and by documents furnished to him will not entitle

(*d*) See *Denton v. Macneil*, Law Rep. 2 Eq. 352.

him to be relieved from his contract. This is well illustrated by *Conybeare v. New Brunswick and Canada Railway Company* (e). The material facts of this difficult case were shortly as follows:—The company was formed for the purpose of purchasing and carrying on a railway belonging to the St. Andrew's and Quebec Railway Company, and of purchasing all the lands and property of that company, and all the rights of the holders of a certain class of shares (called A. shares) in it. The plaintiff applied for shares in the new company, and was informed by its secretary that the A. shares were entitled to a preferential dividend of 6% per cent., and that the holder of every A. share was entitled to four acres of land. The secretary also stated that the new company had acquired some thousands of acres of land from the Colonial Government, and that all claims against the company were regularly liquidated every six weeks; and he gave the plaintiff reports from the directors, in which these and other matters, tending to show the prosperity of the company, were stated. The plaintiff was shown, and he examined, the acts of the Colonial Legislature, by which the lands were granted; and he took copies of all those acts, except one, away with him. That one act, which had been produced to the plaintiff, but which was not amongst those he took away, showed that the title of the company to the lands depended on the completion of the railway by a certain time. The effect of this act was correctly stated in the company's articles of association, and there was nothing to show that it had been intentionally concealed from the plaintiff. It appeared, however, that the directors had been advised by counsel upon the effect of the act upon the title of the company, and that his opinion was not communicated to the plaintiff.

Upon the faith of the above statements and reports, and of the acts furnished to him, the plaintiff took shares in the new company; but before he had completed the purchase, he was

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Conybeare v.
New Brunswick,
&c., Company.

(e) 7 Ho. Lo. Ca. 711, reversing S. C., 1 De G. F. & J. 578, and affirming the decision of V.-C. Stuart in 6 Jur. N. S. 164. See, also, as to the necessity of clearly

proving the fraud relied upon, *Robson v. Earl of Devon*, noticed above; and as to giving particulars of fraud, *McCreight v. Stevens*, 1 Hurls. & Colt. 454.

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informed that the manager abroad had exceeded his authority, and incurred debts to a considerable amount. The plaintiff, having afterwards discovered that the company was in fact greatly in debt, that its affairs were far from prosperous, and that its title to the lands was not absolute but liable to forfeiture, insisted on rescinding his contract. This demand was not acceded to, and he consequently filed a bill to enforce it.

The Vice-Chancellor Stuart and the House of Lords were of opinion that no positive misrepresentation had been made, that no wilful concealment had been practised with reference to the title to the land, and that the plaintiff had not been induced to take the shares upon the faith of that title being indefeasible. Great stress was deservedly laid upon the circumstance that the company's articles correctly recited the act alleged to have been suppressed. The Vice-Chancellor refused, however, to dismiss the bill with costs, but in this respect his decision was reversed (*f*).

It has already been seen that the circumstance that a person has been guilty of misconduct and fraud towards a former partner, does not afford a defence to an action by that person against another who has since agreed to enter into partnership with him in ignorance of his prior conduct (*g*).

Waiver of right
to rescind.

A person entitled to rescind a contract for fraud loses his right if he does not repudiate the contract within a reasonable time after the discovery of the fraud (*h*), and, *a fortiori*, if after such discovery he does anything to affirm the contract, or anything which is inconsistent with his right to rescind it; *e. g.*, if, in the case of shares fraudulently sold to him, he attempts to resell them (*i*).

Rescission *in
toto*.

Further, a person induced by fraud to enter into a contract

(*f*) The lords justices held that the plaintiff was entitled to relief upon the grounds that the title of the company to the land had been represented to him as indefeasible, that he had been put off inquiry by the statements so made to him, and that even if the acquisition of land was not the main inducement of the plaintiff in taking shares, it

formed a material ingredient in the purchase.

(*g*) *Andrewes v. Garstin*, 10 C. B. N. S. 444.

(*h*) See *Denton v. Macneil*, Law Rep. 2 Eq. 352; *Accidental and Marine Insur. Co.*, 1 Weekly N. 363.

(*i*) *Brigg's case*, Law Rep. 1 Eq. 483.

cannot rescind it unless he is himself able to rescind it *in toto*, and to restore the other party to his former position, or unless his inability so to do is attributable to that party (*j*). But if the contract is severable, inability to rescind it as to part is not fatal to the right to rescind it as to another part. Upon this subject the recent case of *Maturin v. Tredinnick* (*k*) is very important. There the plaintiff had been induced by the fraud of the defendant to purchase from him several shares in several mining companies. Before the plaintiff had discovered the fraud he sold some of the shares in one of the companies. He afterwards filed a bill to rescind the contract as to all the remaining shares. Pending the suit one of the companies in which some of these shares were held, was ordered to be wound up; and the shares in one of the other companies were forfeited for non-payment of calls, but the defendant had full notice of the intended forfeiture. The Vice-Chancellor Wood held, (1,) that the sale of some of the shares before the bill was filed did not disentitle the plaintiff from rescinding the contract as to the other shares; and, (2,) that neither the subsequent order to wind-up one of the companies, nor the subsequent forfeiture of shares, afforded any defence to the suit.

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Maturin v. Tredinnick.

Having made these preliminary observations as to the right to rescind contracts for fraud generally, it is proposed to examine the cases which bear more particularly on the right to rescind; first, contracts of partnership, and secondly, contracts of other kinds commonly entered into between partners.

Where a person is inveigled by the false representations of others to become partners with them, a court of equity will clearly rescind the contract of partnership at his instance.

Rescission of
contracts of
partnership.

The case of *Pillans v. Harkness* (*l*), affords a good example of this. In the spring of 1709, four persons, Pillans, Harkness, Stewart, and Denn, agreed by deed to become partners in the

Pillans v. Harkness.

(*j*) See *Clarke v. Dickson*, E. B. & E. 148; *Maturin v. Tredinnick*, 2 New Rep. 514, and 4 ib. 15, V.-C. W.

a defence to the suit as to the shares in the other companies. But quære how this is consistent with the relief actually given.

(*k*) See last note. In this case the V.-C. is reported to have said that a sale of some shares in one of the companies would have afforded

(*l*) Colles, 442 (called *Harkness v. Stewart*, and *Stewart v. Harkness*, in the table of cases to the Dublin edit. of 1789).

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Pillans v. Hark-
ness.

fishing trade, and to share the profits and losses equally, confining their fishing to the west coasts of North Britain. It was subsequently agreed to extend the fishing operations and to increase the capital, and another deed was executed which, it appears, stated that the capital originally agreed to be subscribed had been duly paid by all the partners. Harkness was to take no active part in the partnership business, but Pillans was to have the exclusive management of it in the north, at a salary, and Stewart and Denn were to have the exclusive management of it in London. Pillans was to transmit accounts to London; all proper accounts were to be kept by Stewart and Denn; and Harkness was to have free access to the accounts of the concern. Harkness, from time to time, paid various sums towards carrying on the business of the firm, but it does not appear that anything was ever divided in the shape of real or pretended profits. In the summer of 1711, Harkness discovered that Pillans, Stewart, and Denn, instead of being engaged in the fishing business for the benefit of the firm, were engaged in private speculations of their own in the wine trade. He also discovered, that Pillans and Stewart had not contributed their shares of the capital of the firm, and that Pillans, who had been represented as a person acquainted with, and skilled in fishing, was, in truth, wholly ignorant of fishing, and of everything relating to the fishing trade. Harkness alleged that he confided in the management of Pillans and Stewart without suspicion until July, 1711, when he pressed Stewart to let him see the partnership accounts; that after many frivolous excuses he was shown many fine books, neatly bound, which he was told were the partnership books; that not being versed in accounts he took an accountant with him to examine them; but that to his surprise the books, when opened, were found to consist entirely of blank paper, without a word or figure written in them. Harkness thereupon, finding that he had been fraudulently drawn in and imposed upon by Pillans and Stewart, filed a bill against Pillans, Stewart, and Denn, for a discovery of their transactions under the partnership, and for the recovery of his money (*m*). The

(*m*) The defendants relied on the quiescence on the part of the plaintiff; and particularly on the fact
lapse of time and laches and ac-

Chancellor decreed Stewart and Pillans to account for all monies paid by the plaintiff to them or either of them, and to pay what should appear due to him with interest, the plaintiff to be absolutely discharged from the articles, agreements, and partnerships, Stewart and Pillans to indemnify him from all costs and damages whatsoever touching the articles, or any partnership in respect thereof, and to pay the costs of the suit. This decree was affirmed on appeal to the House of Lords.

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A more recent case of the same description is *Rawlins v. Wickham* (n). There the plaintiff was induced by the misrepresentations of two persons, A. and B., to enter into partnership with them as bankers, and he and they, after carrying on their business for four years, transferred it to other parties. Shortly after this transfer, the plaintiff for the first time became aware of the falsity of the statements by which he had been induced to become a partner. He brought an action against A. and B. for their misrepresentations; pending the proceedings at law A. died, but the action was continued against B., and a verdict against him for damages was obtained. After the verdict B. became insolvent, and thereupon the plaintiff filed a bill against B. and the executors of A., praying that the partnership into which he had entered might be declared void, that the partnership articles might be cancelled, that the defendants might be decreed to repay him the sum paid by him on entering into the partnership, with interest, and to execute a sufficient indemnity against the outstanding debts and liabilities which the plaintiff had or might become subject to in respect of the dealings and transactions of the partnership, and for an account of such debts and liabilities, and of the monies already paid by the plaintiff on account of the partnership debts, and for repayment of such monies with

Although the plaintiff might have ascertained the truth.

Rawlins v. Wickham.

that he had entered into another agreement with them to the effect that the defendants should become partners in another fishing concern, and share their profits in that with the plaintiff, and that such partnership had been entered into. The evidence, however, failed to show

that the plaintiff had any knowledge of this alleged other partnership, or that he was aware of what had been going on, until shortly before he filed his bill.

(n) 1 Giff. 355, and 3 De G. & J. 304.

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interest. A decree was made in the plaintiff's favour, and an appeal by A.'s executors was dismissed. In this case the deceased partner had clearly been a party to the misrepresentation; and although it was proved that he was ignorant of the real truth, and had not stated that to be true which he knew to be false, still it was held that he ought not to have stated what he did not know to be true, and that he was legally answerable for the falsity of his own assertions. It was also held that the plaintiff was entitled to assume that the statements made to him were true until he had reason to suppose that they were not; and that it was no answer to his case that if he had examined the partnership books he would have discovered the true state of affairs (o).

Fraudulent
prospectus.

So where a person has been induced to take shares in a company on the faith of a prospectus issued by its directors in order to induce persons to take shares in it, and the statements in the prospectus are not merely highly coloured expressions of results hoped for and expected, but are untrue representations of facts, material with reference to contracts to take shares, a bill will lie by the person so defrauded to rescind his contract, to have his name removed from the register of shareholders, and to recover the money he has paid for them.

Kisch v. Central
Railway Com-
pany of Vene-
zuela.

Thus, in *Kisch v. Central Railway Company of Venezuela* (p), the prospectus in effect stated (1.) That the company had obtained a concession from a foreign government; (2.) That the contractor had guaranteed a dividend of two-and-a-half per cent. on the paid-up capital during the construction of the works, and (3.) That the foreign government had guaranteed a dividend of nine per cent. on the paid-up capital for twenty years. The real facts were (1.) That the company had for a large sum bought a concession made to another company; (2.) The contractor's guarantee was limited to 20,000*l.*, the capital of the company being 500,000*l.*; (3.) The government guarantee only came into operation in the event of the com-

(o) See, also, *Jauncey v. Knowles*, 8 W. R. 69, where there was also means of knowledge. Compare *Jennings v. Broughton*, ante, p. 931,

where the plaintiff did not rely on the defendant's statements.

(p) 3 De G. J. & Sm. 122.

pany failing, without any default of its own, to realise a profit of nine per cent. on its paid-up capital from its business. The memorandum of association empowered the company to purchase concessions, and the agreement for the purchase of the concession already obtained by others was referred to in the company's articles, but was not disclosed in them. The Court held that the misrepresentations in the prospectus were such as to entitle a person taking shares on the faith of it to rescind his contract, although he was not entitled to rely upon his own ignorance of the memorandum and articles of association, and of what was there disclosed.

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So, in *Smith v. Reese River Company* (q), the prospectus described some silver mines abroad which the company had contracted for, and proposed to work as extremely valuable, whereas in both they were wholly worthless, and were afterwards given up by the company for others, which were more promising. The directors who issued the prospectus did not know that the mines referred to in the prospectus were worthless, they having themselves been duped; but the Court held that a person who had taken shares on the faith of the prospectus was entitled to rescind his contract, and to have the company restrained from suing him for calls (r).

*Smith v. Reese
River Company.*

Again, in *Ross v. Estates Investment Company* (s), a prospectus was issued by the directors of a company after its formation, and the prospectus stated, falsely, that half the first issue of shares had been already subscribed for, and that the company had contracted for the purchase of two properties, on one of which the vendor had already spent 70,000*l.* A person who had been induced to take shares in the company on the faith of this prospectus, was held entitled to rescind his contract, to recover from the company the money he had paid to it for the shares, to have his name removed from the register of shareholders, and to have the company restrained from suing him for calls.

*Ross v. Estates
Investment
Company.*

These cases must not be confounded with those noticed in an earlier part of the work, in which persons have been held

(q) L. R. 2 Eq. 264.

(r) See, as to the immateriality of knowledge on the part of the di-

rectors that their statements were false, *ante*, 325.

(s) L. R. 3 Eq. 122.

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Remedy in equity
as well as at law.

Director selling
his own shares
as unallotted
shares.

Cases of fraud
where an inno-
cent party inter-
venes.

not bound to take shares, in consequence of a departure from the scheme as advertised (*t*).

It was decided more than a century ago that persons who had been induced by fraud on the part of the promoters of a bubble company to subscribe for shares in it, might obtain their money back by a bill in equity, although an action at law might have been brought for the same purpose with success (*u*); and this doctrine has ever since been recognised as correct, and has frequently been acted upon (*x*).

If a director of a company is applied to for unallotted shares, and he transfers to the applicant shares already allotted to himself, he thereby commits a fraud which will enable the transferee to set aside the transfer, and to recover back what he may have paid for the shares (*y*).

In the simple case where two parties only are concerned, viz., the partner defrauded and the partner defrauding, the right of the former to rescind the contract of partnership cannot for a moment be doubted. But where third persons are concerned to whom no fraud is legally or morally imputable, considerable difficulty is experienced in giving effect to this right of the party defrauded, and to the conflicting rights of those who have acted on the faith of his being a partner, and who insist therefore that as between him and them he cannot be heard to say that he is not one (*z*). This difficulty is particularly felt when a creditor of a company seeks to levy execution against a person who is a shareholder therein, but who has been induced to become so by fraud; and it is still more felt when the question arises whether such shareholder ought to be put on the list of contributories on the winding up of the company. As regards the creditors, it is clear that

(*t*) *Ante*, p. 111, *et seq.*

(*u*) *Colt v. Woollaston*, 2 P. W. 154.

(*x*) *Green v. Barrett*, 1 Sim. 45; *Blain v. Agar*, 2 ib. 289; *Cridland v. De Mauley*, 1 De G. & S. 459; *Stainbank v. Fernley*, 9 Sim. 556; *Beeching v. Lloyd*, 3 Drew. 227. Compare *Bell v. Mexborough*, 5 Ra. Ca. 149. A suit in equity is not

the proper remedy for the recovery of deposits where there is no fraud, *Stewart v. Austin*, L. R. 3 Eq. 299.

(*y*) *Blake v. Mowatt*, 21 Beav. 603.

(*z*) See *Ex parte Broome*, 1 Rose, 69; *Jefferys v. Smith*, 3 Russ. 158; *Macbride v. Lindsay*, 9 Ha. 574.

their rights in no way depend upon whether a *de facto* shareholder has been induced to become a shareholder by fraud, or not (*a*). But whether such a shareholder ought or ought not to be put on the list of contributories has given rise to great difference of opinion, as will be seen hereafter when that subject is examined (*b*).

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When a person has been induced by the fraud of some particular shareholder to purchase shares of him, the right of the person defrauded is to rescind the contract of sale, and to throw the shares back on the person from whom he took them, and to be indemnified by him against all losses sustained in consequence of having taken the shares (*c*). This is apparently the limit of the right of the person defrauded in such a case (*d*). If the shares have been actually transferred to him, he is not entitled to have the transfer treated as null and void as between himself and the company; nor to restrain the company from making calls upon him whilst he is a shareholder (*e*). He may be entitled to compel his vendor to accept a re-transfer of the shares, but even this right must, it is conceived, depend upon whether the company is being wound up or not, and upon the power of the directors to refuse to register transfers.

Fraud by seller
of shares.

A charter which has been obtained from the Crown by fraud may be repealed by *scire facias*; but so long as it remains unrepealed its validity cannot be disputed (*f*).

Chartered companies.

Besides being called upon to rescind agreements for the

Rescission of

(*a*) *Henderson v. The Royal British Bank*, 7 E. & B. 356; *Daniel v. The Royal British Bank*, 1 H. & N. 681; *Powis v. Harding*, 1 C. B. N. S. 533; *Howard v. Shaw*, 9 Ir. Law Rep. 335.

(*b*) See *infra*, bk. iv. ch. 3. under the head Contributories. See, as to fraud as a defence to an action for calls, *ante*, p. 637.

(*c*) See *Stainbank v. Fernley*, 9 Sim. 556, and *Seddon v. Connell*, 10 Sim. 58 and 79, and *Mathurin v. Tredinnick*, 2 New Rep. 514, and 4 ib. 15, *ante*, p. 935.

(*d*) An action for damages will lie, see *ante*, p. 721, but this is not so complete a remedy.

(*e*) *Bloxam v. Metropolitan Cab Co.*, 4 New Rep. 51, V.-C. W. is not opposed to this. For although the company was restrained from suing the plaintiff for calls, the plaintiff had not acquired any title to the shares, they having been transferred to him by a person who had himself no title. The transfer was therefore wholly void.

(*f*) See *Macbride v. Lindsay*, 9 Ha. 574.

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contracts made
on a dissolution
of partnership.

Bad bargain not
set aside if there
has been no
fraud.

Knight v. Mar-
joribanks.

formation of a partnership, courts of equity are frequently applied to by partners, or those claiming under them, to rescind agreements of other descriptions, and especially agreements come to on or after a dissolution.

Supposing every member of a firm to be *sui juris*, any one may retire upon any terms to which he and his co-partners may choose to assent; and if there is no fraud or concealment on either side, all will be bound by any agreement into which he and they may enter, although it may ultimately turn out that a bad bargain has been made.

For example, in *Knight v. Marjoribanks* (g) certain persons were partners in a speculation in Australia. The speculation was not at first successful, and it was necessary for the partners frequently to contribute large sums of money for the purpose of carrying it on. The plaintiff, who was one of the partners, was greatly pressed for money, and was unable to contribute his proportion of the required capital. A sum of upwards of 5000*l.* was alleged to be due from him to the concern; he never questioned the accuracy of this statement, but assented to its correctness, and he never examined or sought to examine any books or accounts; and in consideration of the sum so alleged to be due, and of 250*l.* cash, he assigned all his interest in the concern to his co-partners, and released them from all demands. The speculation afterwards proving profitable, he sought to set aside this transaction on the ground of fraud and inadequacy of consideration. But as no fraud was proved, as the plaintiff knew very well what he was about, as he was content that no accounts should be taken, and that no person should act as his adviser, and as, although he was undoubtedly in distress, and his co-partners knew it, yet they had taken no unfair advantage of that circumstance, it was held both by Lord Langdale, and by Lord Cottenham on appeal, that the transaction was binding and could not be impeached (h).

Any arrangement which, on the principle here adverted to,

(g) 11 Beav. 322, and 2 Mac. & G. 10. 6 Madd. 5; *M'Clure v. Ripley*, 2 Mac. & G. 274; *Cockle v. Whiting*;

(h) See also *Ex parte Peake*, 1 Taml. 55. Madd. 346; *Ramsbottom v. Parker*;

is binding on the partners themselves, will also, as a general rule, be binding as between the assignees or executors of the retiring partners on the one hand, and the continuing partners and their assignees or executors on the other (i). But as regards assignees in bankruptcy, it must not be forgotten that they can set aside arrangements entered into in fraud of creditors, although such arrangements may be binding as between the parties to them and their respective executors (k).

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Notwithstanding the inability of a retiring partner, and of those claiming under him, to avoid an agreement fairly come to between him and his co-partners, the good faith and open dealing which one partner has a right to expect from another never require to be more scrupulously observed than when one of them is retiring upon terms agreed to upon the strength of representations as to the state of the partnership accounts; and an agreement entered into on a dissolution will be set aside by courts of equity if it can be shown to have been based upon error or to have been tainted by fraud, whether in the shape of positive misrepresentation or of concealment of the truth. Thus, in *Chandler v. Dorsett* (l), the plaintiff and the defendant dissolved partnership; an account was drawn up by the defendant, who made it appear that there was a balance against the plaintiff. The plaintiff gave his note for the amount of this balance, and afterwards having discovered mistakes in the account, filed a bill for a new account. The defendant pleaded an account stated: but the Court decreed that the defendant should come to a new account, and that what should appear to be due on taking it should be paid with interest. So, in *Spittal v. Smith* (m), where the plaintiff was entitled to a share of the produce of a whaling voyage, and the defendant paid him a sum of money as his share, for which the plaintiff gave a receipt; it was held that as there had been

Agreements
made on a dis-
solution and
based on false
accounts.

Chandler v.
Dorsett.

Spittal v. Smith.

(i) *Ex parte Peake*, 1 Madd. 346; & B. 40; *Warden v. Jones*, 23 Beav. 497.
Ramsbottom v. Parker, 6 Madd. 5;
Luckie v. Forsyth, 3 Jo. & Lat. 388. (l) *Finch*, 431. See, too, *Maddeford v. Austwick*, 1 Sim. 89.

(k) See *Anderson v. Maltby*, 2 Ves. J. 255; *Billiter v. Young*, 6 E. (m) *Taml.* 45.

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concealment on the part of the defendant, the plaintiff was entitled to an inquiry as to whether certain deductions which had been made were proper.

Arrangements
with an expelled
partner.

As has more than once been observed in the course of the present treatise, the principles illustrated by the foregoing decisions apply most strongly to the case of a partner who is expelled by the others. Powers of expulsion are always construed strictly, and unless they are exercised with perfect good faith, the expulsion will be declared void by a court of equity, and the partner wrongfully expelled will be restored to his position, and will not be held bound by accounts which may have been signed by him in ignorance of material facts (*n*).

Agreements
made with the
representatives
of a deceased
partner.

Hitherto the arrangement entered into, and afterwards called in question, has been supposed to have been made between the partners themselves. But more difficulty arises where an arrangement is entered into between the representatives of a deceased partner on the one hand, and the continuing partners on the other. Two cases have here to be considered, according as the representative of the deceased is or is not himself a partner in the firm.

1. Where the
representative is
not himself a
partner.

If an executor of a deceased partner is not a member of the firm, it is competent for him and the surviving partners to agree that the share of the deceased shall be ascertained in a particular way, or be taken at a certain value. And although it has been said that the creditors, or other persons interested in the estate of the deceased, may impeach such an agreement by instituting a suit against the surviving partners and the executors of the deceased (*o*), still agreements of the kind in question cannot be successfully impeached, unless there has been some fraud or collusion between them and the executors.

Davies v. Davies.

In *Davies v. Davies* (*p*) Lord Langdale observed, "It has been said in the course of the argument that, in a suit constituted as this is against the executor and surviving partner of the testator, for an account of the partnership transactions, it was

(*n*) See *Blisset v. Daniel*, 10 Ha. R. & M. 277; *Gedge v. Traill*, ib. 538. 281.

(*o*) See *Bowsher v. Watkins*, 1 (*p*) 2 Keen, 534.

not necessary to prove the fraud and collusion which are charged in the bill, and the case of *Bowsher v. Watkins* was cited in support of that proposition. I well recollect that there were special circumstances which induced Sir John Leach to come to the conclusion he did in that case, and that the decision was far from establishing the general proposition that in every case a bill might be filed against an executor and surviving partner of the testator without charging and proving fraud or collusion. In this case there are no special circumstances. It is a bill filed by persons beneficially interested in the testator's estate against the executor and the surviving partner, and it seeks to have the partnership accounts now. The defendant, the surviving partner, by his plea avers that an account was settled with the executor on the 31st of December, 1832, and that, if unimpeached, is a sufficient defence to the bill." Later cases are in conformity with this decision (q).

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If there has been fraud or collusion between the surviving partners and the executors of the deceased partner, the case naturally assumes a different aspect, and any arrangement between them will be liable to be set aside at the suit of the persons interested in the estate of the deceased (r). And, even although there be no fraud or collusion, still, if the executor has obtained less than the true value of the deceased's share in the partnership estate, the executor may be liable as for a *devastavit*, although the surviving partner may be protected against all demands. But if, in a case of difficulty, the executor has acted with a *bonâ fide* view to do his best for the estate he represents, a court of equity will not be willing to make him account for what, without his wilful default, he might have received from the surviving partners (s).

Effect of fraud
and collusion.

(q) *Chambers v. Howell*, 11 Beav. 6; *Stainton v. The Carron Co.*, 18 Beav. 146; and as to accounts settled by one of several executors, *Smith v. Everett*, 27 Beav. 446.

(r) As in *Cook v. Collingridge*, Jac. 607; *Rice v. Gordon*, 11 Beav. 265. Less than fraud or collusion will justify a suit against an execu-

tor of a deceased partner and the surviving partners, *Travis v. Milne*, 9 Ha. 141, but will not, it is apprehended, invalidate arrangements into which they may have entered for payment of the share of the deceased.

(s) See *Rowley v. Adams*, 7 Beav. 395.

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2. Where the
representative is
himself a part-
ner.

Wedderburn v.
Wedderburn.

Millar v. Craig.

Stocken v.
Dawson.

Rice v. Gordon.

If a partner dies and leaves his co-partner his executor, much greater difficulty is met with than in the case last supposed. By the present hypothesis the executor is invested with two characters, and his interest as surviving partner is often in conflict with his duty as the representative of the deceased. This conflict of duty and of interest renders it almost impossible for the executor to enter into any arrangement with respect to the share of the deceased in the partnership estate which those interested in that share may not afterwards succeed in setting aside (*t*).

In *Wedderburn v. Wedderburn* (*u*), a leading case on this subject, an account of a deceased partner's estate was directed after a lapse of thirty years, and repeated changes in the firm, and after several deeds and a release had been executed by the parties beneficially interested. The surviving partners were the executors of the deceased, and were guardians of the persons beneficially entitled to his share, and the settlements and releases were executed in ignorance of the true state of the partnership accounts. So in *Millar v. Craig* (*x*), where one partner died, leaving four executors, of whom two were members of the firm; an account was settled between the executors and the residuary legatees, and releases were executed; but errors having been proved in the accounts, the releases were set aside, and the accounts were re-opened. Again, in *Stocken v. Dawson* (*y*), a partner by his will authorised a sale of his share to his co-partner, whom he appointed one of his executors. The surviving partner purchased the share of the deceased at a valuation, but the purchase was set aside at the suit of the son of the deceased, after a lapse of seven years. So in *Rice v. Gordon* (*z*), where a partner died, some of his co-partners obtained administration to his estate, and sold part of the assets of the deceased to another of the partners, but at an under value; the sale was set aside at the suit of a creditor.

In all these cases there was some ground for setting aside

(*t*) See *Cook v. Collingridge*, Jac. 607.

(*u*) 2 Keen, 722, and 4 M. & Cr. 41.

(*x*) 6 Beav. 433; in this case no

question was raised as against the partners who were not executors.

(*y*) 9 Beav. 239.

(*z*) 11 Beav. 265.

the arrangement made by the executors, in addition to the mere fact that they were also surviving partners. But, as observed by Lord Eldon in *Cook v. Collingridge* (a), "one of the most established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves that the Court will not inquire whether it has been done or not, but at once says such a transaction cannot stand" (b).

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Difficult position
of representa-
tive.

3. *Of specific performance.*

If two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy for the other is an action for damages, and not, excepting in the cases to be presently noticed, a suit for specific performance. To compel an unwilling person to become a partner with another would not be conducive to the welfare of the latter, any more than to compel a man to marry a woman he did not like would be for the benefit of the lady. Moreover, to decree specific performance of an agreement for a partnership at will would be nugatory, inasmuch as it might be dissolved the moment after the decree was made; and to decree specific performance of an agreement for a partnership for a term of years would involve the court in the superintendence of the partnership throughout the whole continuance of the term. As a rule, therefore, courts of equity will not decree specific performance of an agreement for a partnership (c). Nor will specific performance be decreed of an agreement to become a partner and bring in a certain amount of capital, or in default to lend a sum of money to the plaintiff (d).

General rule
against specific
performance of
agreements for
partnership.

However, if the parties have agreed to execute some formal

(a) Jac. 621.

(b) The position of the executors of a deceased partner will be examined at length hereafter, and the subject above noticed will be again adverted to on that occasion.

(c) *Hercy v. Birch*, 9 Ves. 357; *Sheffield Gas, &c., Co. v. Harrison*,

17 Beav. 294; *Downs v. Collins*, 6 Ha. 418. See, also, *Maxwell v. The Port Tenant Co.*, 24 Beav. 495, and *Vivers v. Tuck*, 1 Moore, P. C. N. S. 516, where, however, there was fraud.

(d) *Sichel v. Mosenthal*, 30 Beav. 371.

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Cases in which
a decree will be
made.

England v.
Curling.

instrument which would have the effect of altering their position at law, and of conferring rights which do not exist so long as the agreement is not carried out, in such a case, and for the purpose of putting the parties into the legal position agreed upon, the execution of that formal instrument may be decreed, although the partnership thereby formed might be immediately dissolved (*e*). The principle upon which a court of equity proceeds in a case of this description, is the same as that which induces it to decree execution of a lease under seal, notwithstanding the term for which the lease was to continue has already expired (*f*).

In *England v. Curling* (*g*), the plaintiff and two of the defendants agreed to become partners as ship agents, for seven, fourteen, or twenty-one years, and they signed with their initials an agreement to that effect. A deed was prepared to carry out the agreement; the deed, however, was never executed, and it differed somewhat from the agreement. The parties carried on business as partners under the agreement for eleven years, and then they began to quarrel. The defendant Curling, who appears to have been in the wrong from the beginning, gave notice to dissolve in three months; he retired from the partnership, and entered in partnership with other persons, and carried on business with them on the premises and in the name of the old firm. The new firm opened the letters addressed to the old one, and gave notice of its dissolution to its correspondents. The plaintiff then filed a bill for specific performance and an injunction, and he obtained a decree (*h*).

(*e*) *Buxton v. Lister*, 3 Atk. 385, and see 1 Swanst. 513, note, and *Stocker v. Wedderburn*, 3 K. & J. 403, *per* V.-C. Wood.

(*f*) See *Wilkinson v. Torkington*, 2 Y. & C. Ex. 726, and the cases there cited.

(*g*) 8 Beav. 129. See the observations of Lord Romilly on this case, in 30 Beav. 376.

(*h*) The following was the minute of the decree:—"The Court doth declare that the agreement for a

co-partnership, dated, &c., is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and doth order and decree the same accordingly. Refer it to the Master to inquire whether any and what variations have been made in the said agreement by and with the assent of the several parties thereto since the date thereof. Let the Master settle and approve of a proper deed of co-partnership

The only other class of cases in which anything like specific performance of an agreement for a partnership will be decreed, is where a person who has agreed with another to share the profits of some joint adventure, seeks to obtain that share after the adventure has come to an end. Although the decree giving him the relief he asks may be prefaced by a declaration that the agreement relied upon ought to be specifically performed, this has not the effect of creating a partnership to be carried on by the litigants, but merely serves as a foundation for the decree for an account, which is the substantial part of what is sought and given. An instance of this class of cases is afforded by *Dale v. Hamilton* (i). There, in substance, three persons had agreed to purchase land; to build on it and improve it; and then to sell it for their common benefit. Land was accordingly obtained, built upon, and improved, and subsequently the right of one of the three persons to any share in the adventure was denied by the other two. He thereupon filed a bill for a sale of the land, for an account of the joint speculation, and for a proper distribution of the monies arising from the sale; and the Court held him entitled to this relief.

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Specific performance where an account only is wanted.

Dale v. Hamilton.

Another instance of the same kind is afforded by *Webster v. Bray* (k). In that case the plaintiff and the defendant had been jointly retained as solicitors to a company. They were not in partnership as solicitors generally, but the plaintiff insisted that they were partners as regarded the business done for the company, and that the payments made by the company to each ought to be shared by both. The defendant insisted that there was no partnership, and that each was to be paid for the work done by himself, and to retain for his own benefit all payments in respect of such work. The plaintiff having resigned, filed a bill for an account, and the Court made a decree in his favour, declaring that the plaintiff and the defendant were jointly and equally interested in the profits and loss

Webster v. Bray.

between the said parties in pursuance of the said agreement, having regard to any variations which he may find to have been made in the said agreement as hereinbefore di-

rected, and let the parties execute it. Continue the injunction against the defendant Curling."

(i) 5 Ha. 369, and 2 Ph. 266.

(k) 7 Ha. 159.

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Other cases of
specific perform-
ance between
partners.

of the business transacted by them, or either of them, as solicitors to the company (*l*).

Relief in the shape of specific performance may be required for other purposes besides carrying into execution agreements to form partnerships. The assistance of a court of equity is often requisite to compel those engaged in a going concern, to act conformably to the articles of partnership; and also to compel those who have dissolved partnership, to observe the stipulations into which they have entered. The principles on which the courts act in granting or withholding assistance when sought for the former purpose, will be considered hereafter; and with respect to the specific performance, after a dissolution of partnership, of agreements entered into by the partners previously to, or at the time of dissolution, it need only be observed that relief will be granted or refused upon the principles by which the Court is ordinarily guided in questions of specific performance, and that nothing turns on the circumstance of the litigants having been partners. It would, therefore, be foreign to the objects of the present treatise to prosecute this subject further; but for purposes of reference, it may be useful to mention that the Court has enforced the following agreements entered into upon or with a view to a dissolution; namely—

Agreements not to carry on business within a certain distance or for a certain space of time (*m*);

Agreements as to the custody of partnership books and the furnishing of copies thereof (*n*);

Agreements that a third party, and he only, shall get in debts (*o*);

Agreements that the value of the share of an outgoing or a deceased partner, shall be ascertained in a specified way and taken accordingly (*p*);

(*l*) *Robinson v. Anderson*, 20 Beav. 98, and 7 De G. Mac. & G. 239, is a similar case.

(*m*) *Whittaker v. Howe*, 3 Beav. 383; *Turner v. Major*, 3 Giff. 442; and see *Coates v. Coates*, 6 Madd. 287, and *Williams v. Williams*, 1 Wils. Ch. 473, note.

(*n*) *Lingen v. Simpson*, 1 Sim. & Stu. 600, and see *Whittaker v. Howe*, 3 Beav. 383.

(*o*) *Davis v. Amer*, 3 Drew. 64; *Turner v. Major*, 3 Giff. 442.

(*p*) *Morris v. Kearsley*, 2 Y. & C. Ex. 139; *Essex v. Essex*, 20 Beav. 442; *King v. Chuck*, 17 Beav. 325;

Agreements that an outgoing partner shall offer his share to his co-partners, before selling it to other persons (q) ;

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Agreements to grant an annuity to a retiring partner and his widow (r) ;

Agreements not to divulge or make use of a trade secret (s).

An agreement to form a company is one the specific performance of which can hardly ever be decreed. Such an agreement may be perfectly valid and binding, but, as is well known, this is not sufficient to entitle one of the parties to it to a decree for specific performance by the other ; for this purpose the agreement must not only be valid, but must also be one which a court of equity can compel performance of in all its details ; if this is practically impossible, an action for damages, and not a suit for specific performance, is the proper remedy. In *Stocker v. Wedderburn* (t), the plaintiff had obtained a patent, and it was agreed between him and the defendants that a company should be formed by them for the purpose of working the patent ; that the plaintiff should assign the patent to the company, give his whole services to it for two years, do his best to improve his invention, and give the company the full benefit of all improvements. Owing to a doubt respecting the validity of the patent, the defendant refused to abide by the agreement, and thereupon the plaintiff filed a bill for specific performance, praying, amongst other things, that the defendants might be decreed to take such steps as might be necessary for the registration and incorporation of the company. To this bill the defendants demurred, and the demurrer was allowed

Specific performance of agreements to form company.

Stocker v. Wedderburn.

Jackson v. Henderson, 1 Weekly N. 360, and see *Featherstonhaugh v. Turner*, 25 Beav. 382, and *Gibson v. Goldsmid*, 5 De G. Mac. & G. 757, reversing S. C. 18 Beav 584. Compare *Downs v. Collins*, 6 Ha. 418, where to have enforced the agreement would have been to decree specific performance of a contract for a partnership ; and *Cooper v. Hood*, 7 W. R. 83, where a decree was refused on the ground that the agreement sought to be enforced was too vague in its terms.

(q) *Homfray v. Fothergill*, Law Rep. 1 Eq. 567.

(r) *Aubin v. Holt*, 2 K. & J. 66 ; and *Bonville v. Bonville*, 6 Jur. N. S. 414, M. R., where the agreement sued upon was decided not to bear the construction contended for by the plaintiff.

(s) *Morison v. Moat*, 9 Ha. 241.

(t) 3 K. & J. 393. See, too, *Maxwell v. Port Tenant Co.*, 24 Beav. 495, where, however, there was fraud.

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with costs, on the ground that the agreement was one and entire, and that if a decree were made in the plaintiff's favour, the Court could neither compel him to perform his part nor restore the defendants to their original position in case he did not.

Specific perform-
ance of agree-
ment to amal-
gamate.

Where two companies, having power to amalgamate, have entered into a binding agreement so to do, specific performance of the agreement will be decreed, if its terms are such that a decree for specific performance can practically be enforced. In the *Anglo-Australian Assurance Company v. British Provident Assurance Company (u)*, an agreement by the defendant company to take the assets and liabilities of the plaintiff company, and to indemnify it against its liabilities, was specifically enforced.

Specific perform-
ance of agree-
ments to take
shares.

The question whether a court of equity will decree the specific performance of an agreement to allot and accept shares in a company, has given rise to some difference of opinion. An ordinary contract for the sale of shares is one which the Court will decree to be specifically performed (*x*); and it is immaterial whether the vendor has or has not other shares which he does not sell, or, in other words, whether he and the purchaser will or will not become co-shareholders. But a contract for the sale of shares by one individual to another, is distinguishable in many respects from a contract for the allotment and acceptance of shares in a company to be formed, and authority is not wanting to show that specific performance of a contract of this last description will not be decreed (*y*). There is, however, at least, equal authority the other way (*z*), and on

(*u*) 3 Giff. 521, and on appeal, 8 Jur. N. S. 628.

(*x*) *Ante*, p. 719, and see *Paine v. Hutchinson*, L. R. 3 Eq. 257.

(*y*) *Sheffield Gas, &c., Co. v. Harrison*, 17 Beav. 294; *Bluck v. Mal-laloe*, 27 Beav. 398; *Columbine v. Chichester*, 2 Ph. 27. In this last case there were circumstances to show that specific performance was impossible.

(*z*) See *New Brunswick and Canada Rail. Co. v. Muggeridge*, 4

Drew. 686, and 1 Dr. & Sm. 363; *Oriental Steam Nav. Co. v. Briggs*, 8 Jur. N. S. 201. Although in both of these cases a decree was refused, in the first on the ground of fraud, and in the second on the ground that there was no concluded agreement, yet the judgments delivered in them show that there is no rule against decreeing specific performance of such agreements as are alluded to above.

principle, it is conceived that, assuming the existence of a valid agreement to take shares, there is no adequate reason why such an agreement should not be decreed to be specifically performed. It is true that the applicant for shares might sell and transfer his shares as soon as the decree was made, but the decree would nevertheless not be inoperative. If the applicant were the plaintiff, he could not be got rid of; whilst if he were the defendant, he could only retire from the company by transferring his shares to somebody else. The reason therefore which induces the Court to decline to decree specific performance of an agreement for an ordinary partnership at will, is scarcely applicable to such an agreement as that now under consideration. Moreover, nothing is more common than for the promoters of a company to agree to sell property to the company in consideration of a certain number of paid-up shares, and it is certainly difficult to see why such a contract should not be enforced; indeed, there is good authority for saying that a decree for its specific performance might be obtained (a). Again, persons who have agreed to take shares in a company, are every day made contributories for the purpose of winding up; and they are so upon the ground that, although they are not actually shareholders, they have entered into an agreement to take shares which is binding upon them. Many of these cases are only intelligible upon the assumption that a contract for the allotment and acceptance of shares is one which a court of equity ought to enforce.

In order, however, that specific performance of an agreement to take or deliver shares in a company may be decreed, it is necessary that the agreement should be concluded and binding (b), and be untainted by fraud (c), and be capable of being performed by the defendant (d), and not involve per-

Defences to suits for specific performance of agreement to take shares.

(a) See *Fyfe v. Swabey*, 16 Jur. 49, M. R.

Maxwell v. Port Tenant Co., 24 Beav. 495.

(b) Which it was not in *Oriental Steam Nav. Co. v. Briggs*, 8 Jur. N. S. 201.

(d) *Birmingham v. Sheridan*, 33 Beav. 660; and see *Columbine v. Chichester*, 2 Ph. 27. See, also,

(c) Which was not the case in *New Brunswick and Canada Rail. Co. v. Muggeridge*, 4 Drew. 686, and 1 Drew. & Sm. 363; or in

Ferguson v. Wilson, L. R. 2 Ch. App. 77, where both specific performance and damages were refused.

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formance by either party of obligations the performance of which a court of equity cannot practically enforce (*e*).

Agreements
with promoters
and directors.

As regards impossibility of performance, it is to be observed that an agreement by A. that B. shall do something, can only be decreed to be specifically performed if the agreement, although in form by A., is in truth an agreement by B. himself, or if B. is bound to do that which it has been agreed he shall do. If B. is not bound, by the agreement or otherwise, to do what A. has agreed he B. shall do, no decree for specific performance can be made against either A. or B. These observations apply to agreements made by promoters and others, to be performed by the company; if the company is not bound by the agreement, a decree cannot be made either against the company or against the individuals who entered into the agreement (*f*).

Mixed cases of
agreement and
fraud.

As a general rule, a person who is not a party to an agreement is not entitled to sue for its specific performance; and where a person has been induced to take shares on the faith of an agreement by others that they will do the same, but which agreement was not made with him, his right against them must be based on their misrepresentation made to him, and not on their agreement between themselves, with which he had nothing to do. An instructive case on this head is *Bell v. Lord Mexborough* (*g*). There an unsuccessful attempt was made by the subscribers to an abortive railway company to compel two members of the provisional committee to perform an agreement to take shares, alleged to have been entered into between them and the managing committee, and to pay up the deposits on the shares so agreed to be taken. The bill alleged that the two members in question had, by appearing as provisional committee men, induced the plaintiffs to take shares; that the same two members had accepted shares in the company from the managing committee, but had never paid the deposits upon them, and that the managing committee refused to take proceedings to compel payment of such deposits. The

Bell v. Mexborough.

(*e*) *Stocker v. Wedderburn*, 3 K. & J. 393, *ante*, p. 951.

(*f*) *Ellis v. Colman*, 25 Beav. 662.

(*g*) 10 Jur. 893, V.-C. E., and 12 Jur. 64 on appeal; also, in 5 Ra.

Ca. 149.

bill also complained of several acts of misconduct on the part of the managing committee, and stated that unless all the deposits on the shares taken were paid up, the company would be insolvent, and the plaintiffs would be liable to be sued by its creditors. The bill then prayed for an account of the dealings and transactions of the company and an account of its assets, including the amounts due from the two members in respect of the shares they had agreed to take, and for the application of the assets in discharge of the liabilities of the company. A demurrer to this bill by the two members complained of, was allowed on the ground that the plaintiffs had not made out any case for relief against them, and that the plaintiffs' remedy was against the committee of management only. The plaintiffs were, in fact, endeavouring to enforce a contract not made with themselves, and they did not seek, on the ground of misrepresentation, any relief to which they would not have been entitled had no such misrepresentation been made. It moreover appeared, from the plaintiffs' own showing, that the demurring defendants had never signed the subscribers' agreement or Parliamentary contract, or done more than express their willingness to take such shares as might be allotted to them.

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Bell v. Mex-
borough.

Although a court of equity will decree specific performance of an agreement to sell shares, it will not interfere to compel the completion of a gratuitous and intended, but unperfected, transaction. Thus, if a person voluntarily settles shares on others, but does not transfer them, or actually constitute himself a trustee of them, the persons intended to be benefited by the settlement do not acquire any equitable title to the shares enforceable against the settlor or his representatives (*h*).

Incomplete
gratuitous
transfers.

4. *Of account and discovery.*

Under this head it is proposed to consider, with reference to partners and persons claiming under them—

1. The right to an account and discovery generally.
2. The defences to a suit for an account and discovery.
3. The decree for a partnership account.

(*h*) *Millroy v. Lord*, 8 Jur. N. S. 806, L. J.

1. *Of the right to an account and discovery generally, as between partners and those claiming under them.*

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Suit for an
account.

The right of every partner to have an account from his co-partners of their dealings and transactions, is too obvious to require comment. The agreement between partners is for a participation of profits, and generally, also, for a community of loss; and, as has been seen, an action at law is not, except under peculiar circumstances, an adequate remedy for the enforcement of the obligations arising from such an agreement. By a suit in equity for an account, however, a partner is enabled to obtain not only a discovery as to his co-partner's dealings, but also payment of what on taking the account may be found to be due from him, whether by virtue of his agreement to share profits, or by virtue of his agreement to contribute to losses. By means of a suit for an account, moreover, a partner is enabled to secure the due application of the partnership assets in payment of the debts of the firm, and the distribution of the surplus amongst himself and co-partners. The equitable remedy of account is, therefore, most efficacious, and by means of it all disputes between partners as to their mutual rights and liabilities respecting profit and loss, are capable of being completely adjusted. This remedy is open to partners although the partnership accounts are not complicated (*i*), and although an action at law might, under the circumstances, be sustainable (*k*). Nor is the jurisdiction of the Court of Chancery, in matters of account, affected by the Common law procedure act, 1854, and the power of directing a reference thereby conferred (*l*). A court of equity is not,

(*i*) *Cruikshank v. M'Vicar*, 8 Beav. 106. See *Frietas v. Dos Santos*, 1 Y. & J. 574.

(*k*) *Wright v. Hunter*, 5 Ves. 792, where the bill was for contribution. *Blain v. Agar*, 1 Sim. 37, and 2 ib. 289, where the bill was for the recovery back of deposits. See, too, *Townsend v. Ash*, 3 Atk. 336, as to the profits of partnership real estate.

(*l*) See *Croskey v. European and American Steam Ship Co.*, 1 J. & H. 108. The cases in which a bill for an account will lie, where there is no partnership, trust, or fraud, are by no means well settled. The sensible rule would be that where discovery is wanted a bill will lie; but that this is not the rule, see *Smith v. Leveaux*, 2 De G. J. & Sm. 1, reversing S. C., 1 Hem. & M.

however, the proper tribunal for the investigation of a claim for damages arising from a wrongful act; and although a court of equity will rescind contracts for fraud and decree compensation in such suits, a bill by one partner against another for the recovery of damages merely will not lie, although in form the suit is for an account (*m*). At the same time, in a suit for a dissolution and winding up of a partnership, claims which in ordinary cases would be settled by action at law, will be adjusted in equity (*n*).

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An account may be had by one partner or his executors or administrators (*o*) against his co-partner or his executors or administrators (*p*). So by the assignees of a bankrupt partner against the solvent partner (*q*) or his executors (*r*). So a solvent partner may file a bill for an account against the assignees of his bankrupt co-partner; and, notwithstanding the rule against making mere witnesses parties, the bankrupt himself may, it is said, be made a defendant for the purposes of discovery, though, if relief is prayed against him, a demurrer by him will hold (*s*). Again, if a partner's share is taken in execution, the purchaser from the sheriff is entitled to an account from the solvent partners, as is, also, the execution debtor himself (*t*).

Persons entitled
to an account.

Servants entitled to a share of profits can maintain a suit for an account, if the accounts which have to be taken are too complicated to be dealt with by a jury (*u*); and an agreement

Servants, &c.

123. Having regard to recent decisions, the complicated nature of the account seems to be the ground on which the jurisdiction of the court is founded in such cases as those here alluded to. See *Smith v. Leveaux*, 2 De G. J. & Sm. 1; *Hemings v. Pugh*, 4 Giff. 456; *Barry v. Stevens*, 31 Beav. 258.

(*m*) *Duncan v. Luntley*, 2 Mac. & G. 30, where shares had been wrongfully sold by the secretary of a company. See, also, *Clifford v. Brooke*, 13 Ves. 132.

(*n*) See *Bury v. Allen*, 1 Coll. 589; *Mackenna v. Parkes*, ante, p. 80, note (*t*).

(*o*) *Heyne v. Middlemore*, 1 Rep. in Ch. 138; *Hackwell v. Eustman*, Cro. Jac. 410.

(*p*) *Beaumont v. Grover*, 1 Eq. Ab. 8, pl. 7.

(*q*) As in *Wilson v. Greenwood*, 1 Swanst. 471.

(*r*) As in *Addis v. Knight*, 1 Mer. 119.

(*s*) *Whitworth v. Davis*, 1 V. & B. 545. See Mitford Pl. 187, edn. 5.

(*t*) See *Habershon v. Blurton*, 1 De G. & Sm. 121; *Perens v. Johnson*, 3 Sm. & G. 419.

(*u*) *Harrington v. Churchward*, 6 Jur. N. S. 576; and see *Turney v. Bayley*, 3 New Rep. 695.

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to pay out of profits confers a right to an account, although an action at law might also be sustained (*x*).

Sub-partners, &c.

A sub-partner has no right to an account from the principal firm, or any of the members of it, except the one with whom he is a sub-partner; for there is no contract or privity save between those two (*y*). It has even been said that if a partner charges or mortgages his share in favour of a creditor, the latter has no right to an account from the other partners of the profits to which their co-partner may be entitled. This, however, is by no means clear (*z*), and as regards partners in mines, it has been decided that a mortgagee of one partner is entitled to an account against the other partners (*a*). If a partner, with the consent of his co-partners, assigns his share in the partnership, the assignee will, by virtue of this assent, acquire the rights of the assignor, and be, therefore, entitled to an account from the other partners (*b*).

Creditors, &c.,
of deceased
partner.

If a partner dies, a question arises as to the right of his creditors and legatees to file a bill against the other partners for an account of the share of the deceased. The creditors of the late firm have an undoubted right to file a bill against the executors of the deceased and the surviving partners, in order to obtain payment of their debt out of the assets of the deceased (*c*). But the separate creditors, or the legatees, or next of kin of a deceased partner, stand in a very different position. In the absence of special circumstances, they have no *locus standi* against the surviving partners, but only against the legal personal representative of the deceased partner (*d*); and it is only when there is collusion between these persons, or when

(*x*) *Ante*, 510.

(*y*) *Brown v. De Tastet*, Jac. 284; *Raymond's case*, cited in *Ex parte Barrow*, 2 Rose, 255; *Bray v. Fromont*, 6 Madd. 5, and see *Killock v. Greg*, 4 Russ. 285, as to agents.

(*z*) See *ante*, p. 697, and *Greenhalgh v. Rumney*, 2 Weekly N. 65. As to the rights of an equitable mortgagee of a share, see *Redmayne v. Forster*, L. R. 2 Eq. 467; *Glyn v. Hood*, 1 Giff. 328, and 1 De

G. F. & J. 334.

(*a*) *Bentley v. Bates*, 4 Y. & C. Ex. 182.

(*b*) See *Fawcett v. Whitehouse*, 1 R. & M. 132.

(*c*) *Wilkinson v. Henderson*, 1 M. & K. 582, and see *post*.

(*d*) *Davies v. Davies*, 1 Keen, 534; *Travis v. Milne*, 9 Ha. 141; *Langley v. The Earl of Oxford*, 2 Amb. 798, Blunt's ed.; *Seeley v. Boehm*, 2 Madd. 180.

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General or limited account.

Account without
a dissolution.

(h) 21 Beav. 61. Compare *Munnings v. Bury*, Tam. 147. The circumstance that an action for contribution will lie, does not oust the jurisdiction of a court of equity, *Wright v. Hunter*, 5 Ves. 792.

cumstance that an action for contribution will lie, does not oust the jurisdiction of a court of equity, *Wright v. Hunter*, 5 Ves. 792.

(g) *Loscomb* v. *Russell*, 4 Sim. 8.

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Cases in which
an account will
be decreed, al-
though no disso-
lution is prayed.

policies, an assured member is entitled to an account of what is due to him upon his policy, and to a decree for the payment of what is so due, without involving himself in any general account of the dealings and transactions of the society, or praying for a dissolution thereof⁽ⁱ⁾.

The old rule, therefore, that a decree for an account between partners will not be made save with a view to the final determination of all questions and cross claims between them, and to a dissolution of the partnership, must be regarded as considerably relaxed, although it is still applicable where there is no sufficient reason for departing from it.

There are three classes of cases in which suits for an account, without a dissolution, are more particularly common, and to which it is necessary specially to refer. These are—

1. Where one partner has sought to withhold from his co-partner the profit arising from some secret transaction.

2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner or to drive him to a dissolution.

3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the suit, and a limited account will result in justice to them all.

1. Account where
one partner with-
holds what the
firm is entitled
to.

1. Where one partner has obtained a secret benefit, from which he seeks to exclude his co-partners, but to which they are entitled, they can obtain their share of such benefit by a suit for an account, and such a suit is sustainable, although no dissolution is prayed. The cases illustrating this doctrine have been already noticed at length^(k), and it will therefore be sufficient here to state that an account was directed, although the plaintiff did not seek to have the partnership dissolved, or its affairs wound up, in

Hichens v. Congreve, 1 R. & M. 150, *ante*, 588.

Fawcett v. Whitehouse, 1 R. & M. 132, *ante*, 589.

Beck v. Kantorowicz, 3 K. & J. 230, *ante*, 590.

The Society of Practical Knowledge v. Abbott, 2 Beav. 559, *ante*, 593.

(i) See *Bromley v. Williams*, 32 Beav. 429. See, too, *Robson v. Beav.* 177; *Hutchinson v. Wright*, *McCreight*, 25 Beav. 272.
25 Beav. 444; *Taylor v. Dean*, 22 (k) *Ante*, p. 586, *et seq.*

In all the other cases of this class, except *Clegg v. Fishwick* (l), in which a dissolution was prayed, the report is silent as to whether a general winding up was sought or not.

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With reference to cases of this description, it may be observed that where the benefit which the plaintiffs assert their right to share has not yet been obtained, but only agreed for by their co-partners, the plaintiffs have no *locus standi* against the person with whom the agreement has been entered into by those partners, and cannot therefore restrain such person from performing that agreement. The proper course for the aggrieved partners to take is to proceed against their co-partners, and claim from them the benefit of the agreement into which they have entered (m).

The equity of the firm is against the delinquent partner only.

2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner, or to drive him to a dissolution. In cases of this description an account has been directed, although no dissolution was asked.

2. Account in cases of exclusion, &c.

The general proposition that courts of equity will interfere under the circumstances now supposed, was laid down by Sir John Leach in *Harrison v. Armitage* (n), where, however, no account was directed, inasmuch as the evidence did not establish a partnership. But in *Chapple v. Cadell* (o) an account was directed at the suit of a minority where the majority had sold a partnership newspaper to a stranger, and some of the more active of the majority had then entered into a fresh agreement with the purchaser to carry on the paper in partnership with him. *Richards v. Davies* (p) went a step further. There a partnership had been entered into for a term of years which was still unexpired. The defendants would come to no account with the plaintiff respecting the partnership dealings and transactions, but on the application of the plaintiff a decree for an account of all past transactions was made. Sir John Leach, in pronouncing judg-

Chapple v. Cadell.

Richards v. Davies.
Defendant refusing to account.

(l) 1 Mac. & G. 294.

(m) See *Alder v. Fouracre*, 3 Swanst. 489, where an injunction was granted restraining the executors of a deceased partner who had agreed for a renewal of a lease from

disposing of the lease when granted, except for the benefit of the partnership.

(n) 4 Madd. 143.

(o) Jac. 537.

(p) 2 R. & M. 347.

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Fairthorne v.
Weston.
Defendant seeking to drive
plaintiff to dissolve.

Other cases.

ment, observed that the plaintiff had no relief at law for money due to him on a partnership account; that if a court of equity refused him relief, he would be wholly without remedy; and in answer to the objection that if such a suit were entertained the defendant might be vexed by a new bill whenever new profits accrued (*q*), his Honour asked what right would the defendant have to complain of such new bill if he repeated the injustice of withholding what was due to the plaintiff?

Fairthorne v. Weston (*r*) is another authority in point. In that case two solicitors entered into partnership for a term of years, and before the term expired the defendant conducted himself in such a way as to prevent the possibility of the partnership business being carried on. The defendant's object was to compel the plaintiff to dissolve. The plaintiff, however, instead of dissolving, filed a bill for an account of the partnership dealings and transactions since the last settlement, and for a receiver. The defendant insisted that the plaintiff was entitled to no relief except with a view to a dissolution; but the Court held otherwise, and observed that there was no universal rule to the effect that a bill, asking for a particular account but not for a dissolution, was demurrable; and that if there were any such rule, a person fraudulently inclined might, of his mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract.

Again, where a person seeks to establish a partnership with another who denies the plaintiff's title to be considered a partner, if the former is successful upon the main point in dispute, an account of the past dealings and transactions will be decreed, although the plaintiff does not seek for a dissolution of the partnership which he has proved to exist (*s*). Upon

(*q*) This objection was made by Lord Eldon in *Forman v. Homfray*, 2 V. & B. 330; by V.-C. Shadwell in *Loscomb v. Russell*, 4 Sim. 8; and by Baron Alderson in *Knebell v. White*, 2 Y. & C. Ex. 15.

(*r*) 3 Ha. 387.

(*s*) *Knowles v. Houghton*, 11 Ves. 168, as reported in Collyer on Partn. 198, note. The defendant, however, did not resist the account after the question of partnership was decided against him.

the same principle it is apprehended, that if a partner is wrongfully expelled, and he is restored to his status as partner by the decree of the Court, an account will be directed, but the partnership will not necessarily be dissolved (*t*).

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As regards mines it has also been decided, that if one co-owner excludes another from his share of the profits, an account will be directed, although no dissolution is prayed (*u*). But, as each co-owner of a mine can sell his share without the consent of the other owners, there is no occasion for him to ask for a dissolution, and the case of a mine is therefore, perhaps, not an apt illustration of the doctrine in question.

Mines.

3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the suit, and a limited account will result in justice to them all, such an account will be directed, although the bill contains no express prayer for a dissolution. The leading case in support of this proposition is *Walworth v. Holt* (*x*), in which Lord Cottenham, in an elaborate and justly celebrated judgment, overruled a demurrer to a bill by some of the shareholders of an insolvent joint-stock bank, on behalf of themselves and others, against the directors, trustees, and public officer of the company, and certain shareholders who had not paid up their calls, praying that an account might be taken of all the partnership assets, and that the outstanding assets might be got in by a receiver, and that the whole might be converted into money, and applied towards the satisfaction of the partnership debts. In delivering judgment the Lord Chancellor observed, "When it is said that the Court cannot give relief of this limited kind, it is, I presume, meant that the bill ought to have prayed a dissolution, and a final winding up of the affairs of the company. How far this Court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say anything

3. Account
where concern
has failed.

Walworth v.
Holt.

(*t*) See *Blisset v. Daniel*, 10 Ha. 493, where the bill prayed for a dissolution, but no dissolution was decreed.

(*u*) *Bentley v. Bates*, 4 Y. & C. Ex. 182.

(*x*) 4 M. & Cr. 619.

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beyond what is necessary for the decision of this case; but there are strong authorities for holding that, to a bill praying a dissolution, all the partners must be parties (*y*); and this bill alleges that they are so numerous as to make that impossible. The result, therefore, of these two rules would be—the one binding the Court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it—that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law.”

Later cases.

In *Walworth v. Holt*, the bill was filed for the sole purpose of having the assets of the company applied in payment of its joint debts; it did not pray an account of the partnership dealings and transactions, for the purpose of obtaining a division of the profits (if any) amongst the persons entitled thereto. If it had, probably a decree would have been refused, either because a dissolution ought to have been asked, or because all the shareholders were not parties to the bill (*z*). But since *Walworth v. Holt* other cases have been decided, in which bills praying for a division of the surplus assets amongst the shareholders, but not expressly praying for a dissolution, have been held good on demurrer (*a*). The case which has gone furthest in this direction is *Sheppard v. Oxenford* (*b*); for there every kind of relief which would have been required in the event of a dissolution was prayed for, although a dissolution in terms was not asked. In *Sheppard v. Oxenford*, a number of persons formed an association for working mines in Brazil. The defendant was the sole trustee of the property,

Sheppard v.
Oxenford.

(*y*) See as to this, *ante*, p. 918.

(*z*) See *Richardson v. Hastings*, 7 Beav. 323, and 11 ib. 174; *Deeks v. Stanhope*, 14 Sim. 57, which were similar cases to *Walworth v. Holt*.

(*a*) See *Apperley v. Page*, 1 Ph.

779; *Wilson v. Stanhope*, 2 Coll. 629; *Cooper v. Webb*, 15 Sim. 454, and *Clements v. Bowes*, 17 ib. 167.

(*b*) 1 K. & J. 491.

and the sole director. Disputes having arisen, a bill was filed by a shareholder on behalf of himself and all the other shareholders against the defendant for an account of the monies received and paid by him on behalf of the association, and for an account of its debts, and for their payment out of the available assets, and for a sale, if necessary for that purpose, of part of the property, and for a division of *profits*. The bill also prayed an injunction to restrain the defendant from selling or disposing of the property, and for a receiver to get in the debts due to the association, and to manage the affairs thereof, until the accounts were taken, but no dissolution was asked. A demurrer to this bill was put in and overruled (*d*), and an injunction was granted restraining the defendant from selling or disposing of the property otherwise than in the ordinary course of business; and a receiver and manager of the property in this country was appointed. It is to be observed that, although this was a case of a mine, the mine was in a foreign country, and was, strictly speaking, partnership property, and not merely so much land belonging jointly or in common to several co-owners.

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Having regard to the decisions in *Sheppard v. Oxenford*, and other modern cases of a similar kind, especially *Apperley v. Page* (*e*) and *Clements v. Bowes* (*f*), it is conceived that the doctrine established in *Walworth v. Holt* may be considered as extending not only to cases where an account is sought for the purpose of having joint assets applied in discharge of the joint liabilities, but also to cases where an account is sought for the additional purpose of obtaining a division of the surplus assets and *profits* amongst the persons entitled thereto. If this be so, the last remnant of the doctrine that, in partnership cases, there can be no account without a dissolution, must be considered as swept away, at least as regards partnerships the members of which are too numerous to be made parties to the suit.

Result of latest cases.

Similar in many respects to the class of cases last referred to, are those in which an unsuccessful attempt has been made to form a company, and the shareholders seek an account of

Suits for the return of deposits where there has been fraud.

(*d*) See 1 K. & J. 501.

(*e*) 1 Ph. 779,

(*f*) 17 Sim. 167.

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the application of the money subscribed, and for a return of the whole or part of their subscriptions. That a suit in equity is in such cases sustainable, although the subscriptions and other deposits might be recovered at law, admits of no doubt; that no dissolution need be prayed is also clearly established.

The instances in which courts of equity have interfered at the suit of the subscribers of bubble companies, and compelled the projectors to return the deposits, have been very numerous during the last quarter of a century.

Colt v. Woollaston.

The earliest case of importance in which this was done was *Colt v. Woollaston (g)*. There one of the defendants had obtained a patent for extracting oil from radishes, and, in conjunction with his co-defendant, had got up a company to work the patent. The whole business was an imposture, and it ended in failure. The plaintiffs had paid 120*l.* each for six shares in the company, and they filed a bill for repayment of their money with interest, which was decreed, with costs. So in *Blain v. Agar (h)*, subscribers to an abortive mining concern obtained a decree for a return of their subscriptions with interest. In these cases relief was sought and obtained on the ground of fraud, which, it was held, clearly gave courts of equity jurisdiction to interfere, although an action for money had and received might have been brought with success.

Blain v. Agar.

Where there has been no fraud.

But it has also been decided that a court of equity will decree the return of subscriptions where the company has become abortive, although no fraud be proved (*i*). It will also, if necessary, direct an account of the monies received, and of the expenses properly incurred by the managers, and payment out of the deposits of those expenses, and a distribution of the surplus; and it will interfere by injunction, and by appointing a receiver in the meantime, although no dissolution is asked (*k*).

(*g*) 2 P. W. 154.

L. R. 3 Eq. 299.

(*h*) 1 Sim. 37, and 2 ib. 289. See, too, *Green v. Barrett*, 1 Sim. 45; *Cridland v. De Mauley*, 1 De G. & S. 459; *Hallows v. Fernie*, 2 Weekly N. 31.

(*k*) *Cooper v. Webb*, 15 Sim. 454; *Wilson v. Stanhope*, 2 Coll. 629; *Apperley v. Page*, 1 Ph. 779; *Clements v. Bowes*, 17 Sim. 167, and 1 Drew. 684, where demurrers to such bills were overruled. See, too, *Sheppard v. Oxenford*, 1 K. & J.

(*i*) See *Harvey v. Collett*, 15 Sim. 332. Compare *Stewart v. Austin*,

A bill for an account need not contain an offer by the plaintiff to pay what, if anything, may be found due from him on taking such account (*l*). It is, however, usual, and at one time it was necessary, to insert such an offer in the bill.

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Offer by plaintiff
to pay what is
due from him.

A bill for an account of partnership dealings is not objectionable, simply because it relates to the dealings of several partnerships, if they, in point of fact, are nothing more than continuations of one firm (*m*). But a suit which prays for, or involves the taking of, an account of the dealings and transactions of two co-existing firms, is open to objection on the ground of multifariousness (*n*).

Suit for account
of several part-
nerships.

A suit in equity cannot be sustained by a person who ought to be a defendant; and although a misjoinder is not attended with the same consequences as formerly, still, if there is only one plaintiff, and he fills two characters, in one of which he is entitled to sue, whilst in the other he ought to be a defendant, the suit cannot, it seems, be sustained. Therefore, in a case where there was a partnership of three persons, A., B., and C., and A. retired, and B. filed a bill against A. and C. to set aside a fraudulent transaction in which the two defendants had concurred, and then A. and B. became bankrupt, it was held that the joint assignees of A. and B. could not proceed with the suit against C. (*o*).

Misjoinder of
plaintiffs.

Again, it must be borne in mind that a bill in equity against two persons praying for relief against one, and in the event of the plaintiff not being entitled to relief against him, then for relief against the other, is bad. In *Seddon v. Connell* (*p*), a bill was filed by a person who alleged that he had been induced by the fraud of directors to buy shares; and the relief prayed was, that it might be declared that the purchase was void as between the plaintiff and the company, and that the company might be ordered to repay the plaintiff his purchase money, with interest; or, in the event of the Court not thinking the

Alternative
cases.

Seldon v.
Connell.

491, *ante*, p. 964, and *Butt v. Monteaux*, 1 K. & J. 98.

(*l*) *The Columbian Government v. Rothschild*, 1 Sim. 103.

(*m*) See *Jefferys v. Smith*, 3 Russ. 158.

(*n*) See *Rheam v. Smith*, 2 Ph. 726.

(*o*) *Robertson v. Southgate*, 6 Ha. 536.

(*p*) 10 Sim. 79.

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plaintiff entitled to such relief, then that the purchase-money might be repaid by the directors who had been guilty of the fraud. A demurrer to the bill was allowed, on the ground that it ought to have shown a direct, and not a contingent, right to relief against each defendant against whom relief was sought, and to have prayed accordingly.

Discovery in suit
for account.

A defendant to a suit for an account is often required to discover and set forth in his answer, details which it is impossible for him to remember, and to ascertain which inquiry and study are necessary.

Oppressive in-
terrogatories.

How far a defendant is bound to answer such questions at all, when he denies the right of the plaintiff to any account, will be considered hereafter. Where the defendant is bound to answer, he is bound to answer fully; but in such cases as those now under consideration, all that a defendant is bound to do is, it seems, to put the plaintiff in the same position as himself; furnishing the plaintiff with every means of information possessed or obtainable by the defendant, and leaving the plaintiff to make what he can of the materials thus furnished to him. A defendant is not bound to digest accounts, or to set out in his answer voluminous accounts existing already in another shape, and which he offers to produce to the plaintiff. Thus, in *Christian v. Taylor* (q), in which the executor of one deceased partner filed a bill for an account against the executors of another deceased partner, and required them to set out in detail many complicated and voluminous accounts, it was held that they were not bound to do so; that they were under no obligation of going through the books for the purpose of giving the plaintiff the information which he asked; and that the defendants could not be compelled to do more than to refer to the books and documents in their possession in such a way as to entitle the plaintiff to have them produced for his inspection (r).

Christian v.
Taylor.

Drake v. Symes.

Where, however, there are specific questions, it is not sufficient for a defendant to refer generally to all his books and

(q) 11 Sim. 401.

(r) See, too, *White v. Barker*, 5 De G. & Sm. 746; *Seeley v. Boehm*, 2 Madd. 176. A defendant is not entitled to set out the accounts

sought for in a book, and to refer to the book instead of scheduling the accounts to the answer. See *Telford v. Ruskin*, 1 Dr. & Sm. 148.

say that, save as therein appears, he cannot answer the questions. He must go a step further, and point out where in particular the information required by each interrogatory is to be found (s).

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A defendant, moreover, is bound to state what he knows, to make inquiries of his agents and servants, to obtain documents to the possession of which he has a right, and to afford the plaintiff either the information sought, or all the means of obtaining information which the defendant himself possesses (t). A defendant who has it in his power to obtain information cannot escape from discovery simply by saying he does not know. In *Taylor v. Rundell* (u), the executors of a lessor of a mine filed a bill against the lessees for a discovery of the ground opened, and for an account of the produce. The defendants were two of the directors of the company by which the mine was worked. The defendants put in an incomplete answer, stating, by way of excuse for so doing, that certain accounts were in the possession of the company's agent in America; that the copies furnished by him were in the custody of the secretary of the company, that the defendants had no power to inspect the accounts except by an order of the Board, or, as shareholders, at certain short and specified times; and that the plaintiffs had, by means of an agent appointed for that very purpose, equal facilities and powers with the defendants to obtain the information desired. The answer was held insufficient, first by Vice-Chancellor Shadwell, and afterwards by Lord Cottenham, on appeal; the former holding that the defendants ought to have stated that they had applied to the agent abroad; and the latter holding that it ought to have appeared in the answer that the Board of Directors had been applied to for leave to procure and give

Defendant must
make inquiries.

Taylor v. Rundell (1).

(s) *Drake v. Symes*, Johns. 647. See, as to taking oppressive interrogatories off the file, S. C. 2 De G. F. & J. 81, and generally on this subject, Wigram on Discovery, 165—169.

(t) As to what accountants' reports, &c., are privileged, see *Walsham v. Stainton*, 2 Hem. & M. 1.

As to setting out a list of the debtors to the firm, see *Telford v. Ruskin*, 1 Dr. & Sm. 148, where it was held that such a list must be given. Compare the observation of V.-C. Wood in *Drake v. Symes*, Johns. 651.

(u) 11 Sim. 391, and Cr. & Ph. 104.

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the information required, and that such leave had been refused. Lord Cottenham added, "If it is in your power to give the discovery, you must give it; if not, you must show that you have done your best to procure the means of giving it" (x).

Taylor v. Rundell (2).

In another suit between the same parties for similar objects, but relating to another mine (y), the defendants again put in an incomplete answer, excusing themselves on the ground that the books and documents containing the information sought to be obtained were in the possession of the secretary as the agent of the company, and that the directors had ordered him not to allow the defendants to see the books; but this was held insufficient by the V.-C. Knight Bruce, and by Lord Cottenham, on the ground that the defendants had a *right* to see the books, and that they were bound to exercise that right, and if necessary, to file a bill for the purpose of enforcing it. Lord Cottenham there said, "A party is bound to inspect and answer as to the contents of all documents that are in his possession or *power*; and all which he has a *right* to inspect, provided he can enforce that right, are in his *power*."

Directors denying possession.

Books and papers which are in the possession of the company are, for purposes of discovery, in the possession or power of the directors, and they cannot avoid giving a list of the documents of the company by saying that they, the directors, have none (z).

In case it becomes necessary for a defendant to remove obstacles thrown in his way, he should apply for further time to answer, and not put in an answer which is insufficient (a).

Production of documents.

In connection with this subject it may be useful to remind the reader of the rule, that a person cannot be compelled to

(x) See, too, *Stuart v. Lord Bute*, 11 Sim. 442, and 12 ib. 460; *A.-G. v. Rees*, 12 Beav. 50; *Earl of Glen-gall v. Fraser*, 2 Ha. 99, and compare *Martineau v. Cox*, 2 Y. & C. Ex. 638, where it was held that a partner here in a firm carrying on business in a foreign country, was not bound to set out a list of docu-

ments in the possession of the partners abroad.

(y) *Taylor v. Rundell*, 1 Y. & C. 128, and 1 Ph. 222.

(z) *Clinch v. Financial Corporation*, L. R. 2 Eq. 271.

(a) *Taylor v. Rundell*, 1 Ph. 222; *Pickering v. Rigby*, 18 Ves. 484.

produce books which belong to himself and others who are not before the Court. Thus in *Murray v. Walter* (b), the defendant in his answer stated, that certain books relating to a concern in which the plaintiff claimed to be a partner with the defendant, were in the possession of the treasurer of the concern on behalf of the several shareholders in it, many of whom were not parties to the suit; and it was held that the defendant could not be compelled to produce the books in question, although it was insisted, on the authority of *Walburn v. Ingilby* (c), that the plaintiff had a right to have whatever access to the books the defendant himself was entitled to. There are several other decisions to the same effect as *Murray v. Walter* (d), but the doctrine there laid down does not apply to cases in which the absent parties interested in the books are in fact represented by the defendants on the record, and have no interest in conflict with theirs (e).

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Murray v.
Walter.

If the plaintiff has agreed to accept the defendant's statement of profits, and not to investigate his books and accounts, the defendant will not be compelled to produce them before the hearing of the cause (f).

Agreement pre-
cluding inspec-
tion.

A person who obtains an order for the production of documents is entitled not only to inspect them himself, but to have them inspected by his solicitors and agents (g). But neither he nor they are entitled to make public the information they obtain by means of such inspection. The order is made with a view to the administration of justice between the litigant parties; and an injunction will, if necessary, be granted to restrain the communication to strangers of what may be ascertained in the course of an examination of the books and documents produced under the order (h).

Inspecting docu-
ments.

The common order does not entitle the person in whose favour it is made to inspect by a professed accountant specially

Inspection by
accountants.

(b) Cr. & Ph. 114.

(c) 1 M. & K. 79.

(d) *Reid v. Langlois*, 1 Mac. & G. 627; *Burbidge v. Robinson*, 2 Mac. & G. 244; *Penney v. Goode*, 1 Drew. 474; *Stuart v. Lord Bute*, 13 Sim. 453.

(e) *Glyn v. Caulfield*, 3 Mac. & G. 463.

(f) *Turney v. Bayley*, 3 New R. 695, L. J.

(g) *Williams v. Prince of Wales' Life, &c., Co.*, 23 Beav. 338.

(h) *Ibid.*

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Books in con-
stant use.

Inspection of
books of corpo-
rations.

Payment of part-
nership moneys
into court.

appointed for the purpose; but if there is any necessity for so doing, a special order for inspection by such a person will be made (i).

Books in use for daily business are ordered to be produced at the place where they are usually kept; and they will not be ordered to be deposited with the record and writ clerks, unless there is some special reason for so doing (k).

When an order is made against a company for the inspection of its books, and the directors will not allow them to be produced, an order for their production will be made against the directors personally (l).

If, in a suit by one partner against another for an account, the defendant admits in his answer that he has in his hands money belonging to the firm, or that he had such money, and ought to have it still, he can be compelled to pay such money into court before the hearing of the cause (m). As a general rule, however, a partner having partnership monies in his hands, cannot be made to pay those monies into court if he insists that on taking the accounts a balance will be found due to him (n). Nor will he be compelled so to do unless the other partners will pay in what they may have in their hands (o). Nor will a partner be ordered to pay into court the amount of a debt due from him to the firm, if the amount to which he is indebted is not admitted, and can only be ascertained by a complicated calculation (p). But if a

(i) *Bonnardet v. Taylor*, 1 J. & H. 383. In *Draper v. Manchester and Sheffield Rail. Co.*, 7 Jur. N. S. 86, L. J., an unsuccessful attempt was made to compel a company to submit to an inspection of its books by an accountant of a rival company.

(k) *Martens v. Haigh*, Johns. 735.

(l) *Lacharme v. Quartz Rock Mining Co.*, 1 Hurls. & Colt. 134. As to the form of an order for production by a corporation, see *Ranger v. Great Western Rail. Co.*, 4 De G. & J. 74.

(m) In *White v. Barton*, 18 Beav.

192, an admission by one partner that he and his co-partner who was not a party had money in their hands was held sufficient.

(n) *Richardson v. The Bank of England*, 4 M. & Cr. 165. But in *Birley v. Kennedy*, 6 New Rep. 395, a partner who admitted that he had drawn out more than he ought was ordered to pay the excess into court.

(o) *Foster v. Donald*, 1 J. & W. 252.

(p) See *Mill v. Hanson*, 8 Ves. 68.

partner admits that he has partnership monies in his hands, and it appears from his own statements that they came there improperly (*q*), or in violation of good faith, he will be compelled to pay them into court (*r*); so if he admits facts from which it appears that he is indebted to the firm in a certain sum, and he does not insist that on the whole the firm is indebted to him, the money admitted by him to be due will be ordered into court (*s*).

If the partnership debts are unpaid, and the defendant is liable to be sued for them, the order directing payment into court should reserve to him liberty to apply for payment out of court, of the amount of the debts he may be compelled to pay (*t*).

2. *Of the defences to a suit for an account and discovery between partners and persons claiming under them.*

The defence on the ground of illegality, of laches on the part of the plaintiff, and of want of proper parties to the suit, have already been examined at some length (*u*). In addition, however, to these grounds of defence, there are others which require notice, and which cannot be more conveniently alluded to than in the present place, and under the following heads.

(*q*) See *Costeker v. Horrox*, 3 Y. & C. Ex. 530, where a surviving partner, being also the executor of his deceased co-partner, was ordered to pay into court 7000*l.*, the amount of assets of the deceased improperly applied to partnership purposes. See the next note.

(*r*) *Jarvis v. White*, 6 Ves. 738; *Foster v. Donald*, 1 J. & W. 252; in the first of these cases the motion was made before answer. In *Hichens v. Congreve*, 1 R. & M. 150, note, and *Gaskell v. Chambers*, 26 Beav. 360, directors obtaining secret benefits for themselves were ordered to pay the monies received by them into court.

(*s*) *Toulmin v. Copland*, 3 Y. & C. Ex. 643; *Costeker v. Horrox*, 3 Y. & C. Ex. 530. In *Domville v. Solly*, 2 Russ. 372, an order was made though the defendant insisted that the plaintiff was entitled to nothing.

(*t*) *Toulmin v. Copland*, 3 Y. & C. 643. In S. C. 6 Price, 405, it was held that a surviving partner was not entitled to have partnership funds, on which the plaintiffs had put a *distringas*, transferred to him to enable him to pay outstanding debts.

(*u*) See as to illegality, *ante*, p. 203, as to laches, *ante*, pp. 900, *et seq.*, as to parties, *ante*, pp. 912, *et seq.*

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Sect. 3.

1. Denial of partnership.
2. Statute of limitations.
3. Account stated.
4. Award.
5. Payment, and accord and satisfaction.
6. Release.

1. Denial by
defendant of the
alleged partner-
ship.

By plea.

Mansell v.
Feeney.

1. *Denial of partnership*.—A suit by one partner against another for an account of the dealings and transactions of an alleged partnership may be met by a denial of the existence of any such partnership. This defence should, if possible, be taken by plea (*x*), and not by answer, and the plea must be accompanied by an answer denying those allegations in the bill which, if true, would establish the partnership (*y*). On these points the following recent case is particularly instructive.

In *Mansell v. Feeney* (*z*), a suit for an account of alleged partnership transactions was met by a plea denying the partnership, and also by an answer in which the statutes of limitations and laches on the part of the plaintiff were set up as grounds of defence to the suit. It was held—1st, that notwithstanding the 9th rule of the 14th consolidated order the defendant was not entitled to put in both a plea and an answer, each containing separate defences to the whole bill (*a*); 2nd, that the plea was bad, as it was not accompanied by an answer denying the possession of documents relevant to the question of partnership or no partnership. In the same case (*b*), it was held that the plaintiff was entitled to an inspection of all documents admitted by the defendant to be in his possession and to be relevant to the matters in question in the suit, although the defendant denied the partnership alleged by the bill, and also denied that the documents in question tended to prove its existence. The defendant, however, was allowed to seal up those parts of the books which he swore had no relation to the matters in question.

(*x*) *Drew v. Drew*, 2 V. & B. 159; *Hare v. London and North Western Rail. Co.*, Johns. 722, is an instance in which a bill was successfully met by a plea denying that the plaintiff was a shareholder in the company.

(*y*) *Harris v. Harris*, 3 Ha. 450; *Sanders v. King*, 6 Madd. 61.

(*z*) 2 J. & H. 313.

(*a*) See, also, on this point, *Lowndes v. Garnett, &c., Mining Co.*, 2 J. & H. 282.

(*b*) 2 J. & H. 320.

If a defendant does not plead but answers, he must answer fully; and in accordance with this rule, it has been held that a defendant cannot by answer deny the alleged partnership, and excuse himself on that ground from setting forth the accounts required by the bill (*c*). The inconvenience and greater expense of putting in a partial answer, and of having its sufficiency discussed upon exceptions, are the reasons relied upon as justifying the rule in question (*d*); but on the other hand, it must not be forgotten that there are so many purely technical requisites to the validity of a plea in equity, that a substantial defence so raised is always liable to be overruled, on some point of form having a very remote if any bearing on the true merits of the case. It would therefore be much to be regretted, if the older cases (*e*) in which a defendant was allowed by answer, to deny the partnership alleged by the plaintiff, and to decline to set out the accounts sought by him were overruled; for if the plaintiff's bill be artfully framed, it may be impossible for the defendant to protect himself by plea or demurrer, or consequently at all, from setting out or producing voluminous accounts with which the plaintiff may have no concern whatever.

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By answer.

This seems to have been felt by the court of appeal. For in a leading case on this subject, where the defendant denied the plaintiff's title by answer, and declined setting out accounts which could not by any possibility be of use to the plaintiff until he had succeeded on the issue thus raised, although exceptions to the answer were allowed by the Master of the Rolls, the Lords Justices directed the case to be argued on its merits (on a motion for decree to come on with the appeal), and they ultimately dismissed the bill (*f*). So, in a still more

Clegg v. Edmonson.

(*c*) *Hall v. Noyes*, 3 Bro. C. C. 483; ——— *v. Harrison*, 4 Madd. 252; *Somerville v. Mackay*, 16 Ves. 382; *Clegg v. Edmonson*, 22 Beav. 125; *The Great Luxembourg Rail. Co. v. Magnay*, 23 Beav. 646; *Reade v. Woodroffe*, 24 ib. 421; *Blackley v. Rymer*, 4 Drew. 248.

(*d*) See 16 Ves. 387.

(*e*) *Jacobs v. Goodman*, 2 Cox,

282; *Donegal v. Stewart*, 3 Ves. 446, and see Mitf. Pl. 313.

(*f*) See *Clegg v. Edmonson*, 22 Beav. 125, and 8 De G. Mac. & G. 787. See, also, *Turney v. Bayley*, 3 New Rep. 695, where the plaintiff had agreed to accept the defendants' statements as to profits, and not to investigate his books.

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De la Rue v.
Dickinson.

2. Statute of
Limitations.

Cases in which
the statute has
been held a bar
in equity.

Bridges v.
Mitchell.

recent case, exceptions were taken to an answer denying the plaintiff's title, and declining to set out accounts which could not be of the least use to the plaintiff until after he had established that title, and the Vice-Chancellor Wood directed the exceptions to stand over until the hearing of the cause (*g*).

Upon the whole, therefore, it is conceived that where the title of the plaintiff to relief is denied, it is competent to a defendant to deny the plaintiff's title by *answer*, and, whilst giving him every discovery which can possibly assist him in establishing that title, to decline to answer those interrogatories, which can only be material after that title is established (*h*).

2. *The Statute of Limitations*.—The Statute of Limitations, 21 Jac. 1, c. 16, § 3, enacts that all actions of account (other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants (*i*)) shall be commenced and sued within six years next after the cause of such action or suit.

A court of equity is as much bound by this statute as a court of law (*k*); and advantage may be taken of it by plea (*l*), or by answer (*m*), or by demurrer if the facts sufficiently appear on the face of the bill (*n*).

Thus, where an account had been stated between two partners, and a balance was found due to one of them from the other, and twenty-four years afterwards a bill was filed by the former against the latter for discovery and an account, a plea that, according to the plaintiff's own showing, the balance

(*g*) *De la Rue v. Dickinson*, 3 K. & J. 388.

(*h*) See Mitf. Pl. 371, 5th edit.; Wigram on Disc. 221 and 224, but see also 96, 114, 117, 2nd edit.

(*i*) This exception no longer exists. See 19 & 20 Vict. c. 97, § 9. See, as to the exception, *Robinson v. Alexander*, 8 Bli. N. S. 352, and 2 Cl. & Fin. 717, and the cases there referred to.

(*k*) *Foley v. Hill*, 1 Ph. 399; *Hovenden v. Annesley*, 2 Sch. & Lef. 607; and see *Whitley v. Lowe*, 25

Beav. 421, and 2 De G. & J. 704.

(*l*) See *Welford v. Liddel*, 2 Ves. S. 400; Beames' Pleas in Eq. 161. In *Robinson v. Field*, 5 Sim. 14, and *Jones v. Pengree*, 6 Ves. 580, the plea was overruled as covering too much.

(*m*) As in *Martin v. Heathcote*, 2 Eden, 169; *Tatam v. Williams*, 3 Ha. 347.

(*n*) *Foster v. Hodgson*, 19 Ves. 180; *Hoare v. Peck*, 6 Sim. 51; *Prance v. Simpson*, Kay, 678.

was due twenty-four years before the filing of the bill, and that his remedy was barred by the statute, was allowed (o). In a subsequent case the defendant insisted in his answer that none of the transactions in respect of which the account was sought, occurred within six years before the filing of the bill, and the bill was thereupon dismissed (p). So, where a partner died, and seventeen years afterwards a bill for an account was filed against his executors by the surviving partners, the bill was dismissed with costs (q); nor is there apparently any reason why a suit by the executors of a deceased partner against a surviving partner should not be barred by lapse of time where there is no express trust to prevent the statute of limitations from running.

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Martin v. Heathcote.

Tatam v. Williams.

Again, in *Foster v. Hodgson* (r), the case was, in substance, as follows: there was a running account between a firm and its bankers; the head of the firm died, and the account then stopped, but was not formally adjusted or settled; twelve years afterwards, a bill was filed against the bankers for an account, on the ground that a considerable balance was, in fact, due from them to the firm. The defendants demurred, and the demurrer was allowed, on the ground that the case did not appear to be within the exception relating to merchants' accounts; that consequently the lapse of more than six years since the account stopped, was an answer to the suit; and that as this fact appeared on the face of the bill, the objection was properly taken by demurrer (s).

Foster v. Hodgson.

But although courts of equity, like courts of law, are bound by the statute of limitations, there are cases in which those statutes do not afford a defence in equity, although they might do so at law. Where, for example, a partner has died, having by will disposed of his property on trusts for payment of his

Cases where the statute affords no defence in equity.

(o) *Bridges v. Mitchell*, Bunb. 217. See, too, *Whitley v. Lowe*, 25 Beav. 421, and 2 De G. & J. 704.

(p) *Martin v. Heathcote*, 2 Eden. 169, and see *Barber v. Barber*, 18 Ves. 286. These cases were overruled by *Robinson v. Alexander*, 2 Cl. & Fin. 717, on the ground that they came within the exception

relating to merchants' accounts, although there was no item on either side within six years. That exception however no longer exists.

(q) *Tatam v. Williams*, 3 Ha. 347.

(r) 19 Ves. 180.

(s) See, too, *Hoare v. Peck*, 6 Sim. 51, and *Prance v. Sympson*, Kay, 678.

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Stainton v. Carron Company.

Difference between liability to partners and liability to creditors.

Merchants' accounts.

debts, this is sufficient to justify a decree for an account of partnership transactions in respect of which claims existed when he died, although more than six years have elapsed since that time, and before the filing of the bill (*t*). Again, in cases of breach of trust and of fraud, there seems to be no limit to the time at which a court of equity will interfere and afford redress to the parties aggrieved. The mere lapse of thirty or forty years since the right first accrued, is insufficient to bar the remedy in such cases.

In the late case of *Stainton v. The Carron Company* (*u*), the management of the affairs of a company was entrusted to a person who was entitled to one-sixth of the shares in it. He was the manager of the company from 1808 until 1851, when he died. For twenty-five years he rendered accounts regularly, and these accounts were never questioned during his life. But after his death, it was discovered that upwards of 2000*l.* a year for many years had not been properly accounted for by him, and the company claimed from his estate nearly 70,000*l.* in respect of this annual deficiency, and asserted a lien for this sum on his shares and assets in the hands of the company. Notwithstanding the lapse of time, and the reception without dispute of the accounts sent in by the manager from year to year, a decree was made, opening the whole account from the year 1825 down to his death (*x*).

Again, several modern acts of Parliament limit the duration of a retiring shareholder's liability to creditors to three years after his retirement; but it does not, therefore, follow that the duration of his liability to contribute with his late co-shareholders to debts for which he was liable with them, is also limited to the same three years (*y*).

With respect to accounts between partners, an important question arises with reference to the effect of the repeal of so much of the old statutes as relates to merchants' accounts. The authorities which have been already referred to as show-

(*t*) *Ault v. Goodrich*, 4 Russ. 434. *Wedderburn*, 2 Keen, 722, and 4 M. & Cr. 1.

(*u*) 24 Beav. 346.

(*y*) *Gouthwaite's case*, 3 Mac. &

(*x*) See, too, *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Wedderburn v.*

G. 187.

ing that the statutes of limitations are a bar to a suit for an account, did not apply to open unsettled accounts, extending from a time more than six years before a bill was filed, down to a time within such six years. Formerly, by reason of the express exception in the statute of James, accounts which concerned the trade of merchandise between merchant and merchant might be taken, although more than six years had elapsed since the last transaction forming an item in the account, and although there had been no acknowledgment, or part-payment, to take the case out of the statute (z). And notwithstanding the words in the statute of James, "All actions of account . . . shall be commenced and sued," &c., it was held that, even as between ordinary persons, the statute did not begin to run so long as the account was continued (a); and that the statute did not, in any case, apply to an unsettled, open, mutual account, with items on both sides representing cross demands (b). The law in this respect was modified by Lord Tenterden's act (c), the effect of which is, that, although there may be a mutual open running account, the mere existence of items not barred, is not sufficient, in actions of debt or assumpsit, to take earlier items out of the statute of limitations (d). Lord Tenterden's act, however, did not apply to merchants' accounts as to which there was no statutory bar; but now merchants' accounts are on the same footing as other accounts. Whether, therefore, partnership accounts are or are not merchants' accounts, it is difficult to see why the statutes of limitation should not apply to them, and be a bar to a suit for an account extending to a period more remote than six years before the filing of the bill, unless there has been a breach of an express trust, or fraud, or pay-

Application of
statute to cur-
rent accounts.

(z) *Robinson v. Alexander*, 8 Bli. N. S. 352, and 2 Cl. & Fin. 717, settled this point, and finally overruled a number of earlier cases.

(a) See *per* Lord Eldon in *Foster v. Hodgson*, 19 Ves. 185; *Scudmore v. White*, 1 Vern. 456.

(b) See the notes to *Webber v. Tivill*, 2 Wms. Saund. 126, *et seq.*,

and *Catling v. Skoulding*, 6 T. R. 189.

(c) 9 Geo. 4, c. 14.

(d) *Williams v. Griffiths*, 2 Cr. M. & R. 45; *Cottam v. Partridge*, 4 Man. & Gr. 271; *Ashby v. James*, 11 M. & W. 542; *Clark v. Alexander*, 8 Scott, N. R. 147; *Inglis v. Haigh*, 8 M. & W. 780. See, too, *Jackson v. Ogg*, Johns. 397.

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Knox v. Gye.

Effect of acknowledgment.

Payment by receiver in a suit.

3. Account stated.

ment, or an acknowledgment, such as required by Lord Tenterden's act, or unless the partnership articles are under seal. So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run (*e*). The only case, so far as the writer is aware, in which this point has been discussed, is *Knox v. Gye* (*f*), in which a surviving partner relied on the statute as a defence to a suit for an account instituted by the executor of a deceased partner. The deceased partner had died more than six years before the filing of the bill, and the right of his executor had never been recognised; the surviving partner, however, had continued the partnership business, and had got in outstanding assets within six years. The V.-C. Wood held that the statute was not a bar to the suit; but the decision was reversed by Lord Chelmsford on appeal.

With reference to acknowledgments, it was held in a recent partnership case, where no account had been come to for six years, that a signed acknowledgment of a liability to account in respect of matters more than six years old, was sufficient to justify a decree for an account in respect of them, although the acknowledgment did not contain an admission that anything was due, nor any express promise to pay what might be found due on taking the account (*g*).

Where a partnership account is agreed to be taken, and a receiver is appointed, a payment made by the receiver to one of the partners on account of a debt owing to him by another partner, is not sufficient to prevent the statute from being a bar to such debt (*h*).

3. *Account stated*.—To a bill for an account of partnership dealings and transactions, an account thereof already stated

(*e*) See some remarks as to the effects of the statute between partners in *Winter v. Innes*, 4 M. & Cr. 111, and *Way v. Bassett*, 5 Ha. 68.

(*f*) 2 Weekly N. 73. See 19 & 20 Vict. c. 97, § 9.

(*g*) See *Prance v. Sympson*, Kay, 678. The expression was, "you and I must go into it and settle the account."

(*h*) *Whitley v. Lowe*, 25 Beav. 421, and 2 De G. & J. 704.

between the parties (*i*) affords a good defence (*k*). Such a defence may be pleaded, or relied on in an answer (*l*). No precise form is necessary to constitute a stated and settled account; but an account stated, unless it be in writing, is no defence to a bill for a further account. It is not, however, necessary that the account should be signed by the parties, if it can be shown to have been acquiesced in by them (*m*); and an account may be stated and settled, although a few doubtful items are omitted (*n*). It is to be observed, that the fact that an account has already been *rendered* by the defendant to the plaintiff does not deprive the latter of his right to have the same account taken under the direction of a court of equity (*o*); to have that effect an account must not only have been sent in to the plaintiff, but also have been acquiesced in by him (*p*). It is further to be observed, that although the principle on which accounts have been kept may have been acquiesced in, the items may not (*q*).

Accounts of companies laid before the shareholders at a general meeting, and approved and adopted by them, cannot be impeached by absent or dissentient shareholders, except upon the ground of proved error or of fraud (*r*).

Adopted accounts
of companies.

A stated account may be impeached either wholly or in part on the ground of fraud or mistake. If there be fraud, or if any mistake affects the whole account, the whole will be opened, and a new account will be directed to be taken, with-

Impeaching an
account stated,
on the ground of
fraud and mis-
take.

(*i*) Of course the maxim, *Res inter alios, &c.*, applies to settled accounts, *Carmichael v. Carmichael*, 2 Ph. 101.

(*k*) *Taylor v. Shaw*, 2 Sim. & Stu. 12. An account settled by a majority was held binding on the minority in *Robinson v. Thompson*, 1 Vern. 465. See, too, *Stupart v. Arrowsmith*, 3 Sm. & G. 176, and *Kent v. Jackson*, 2 De G. Mac. & G. 49.

(*l*) *Endo v. Caleham*, You. 306.

(*m*) See *Hunter v. Belcher*, 2 De G. J. & Sm. 194; *Morris v. Harrison*, Colles, 157; *Willis v. Jernigan*, 2 Atk. 252. See on this defence in general, Beames' Pleas in

Equity, 222, and Mitford, 302, edit. 5. A verbal account and a receipt in full is not equivalent to a stated account, *Walker v. Consett*, Forrest, 157.

(*n*) *Sim v. Sim*, 11 Ir. Ch. 310.

(*o*) See *Clements v. Bowes*, 1 Drew. 692.

(*p*) *Irvine v. Young*, 1 Sim. & Stu. 333.

(*q*) See *Mosse v. Salt*, 32 Beav. 269; *Clancarty v. Latouche*, 1 Ball & Beatty, 420. Compare *Hunter v. Belcher*, 2 De G. J. & Sm. 194.

(*r*) See *Holmes' case*, 2 De G. Mac. & G. 113; *Stupart v. Arrowsmith*, 3 Sm. & G. 176; *Kent v. Jackson*, 2

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out reference to that which has been stated (s); but if there be no fraud, and if no mistake affecting the whole account can be shown, but the correctness of some of the items in it is, nevertheless, disputed, the account already stated will not be treated as non-existing, but will be acted upon as correct, save so far as the party dissatisfied with any item can show it to be erroneous (t). In a case of fraud, an account will be opened *in toto*, even after the lapse of a considerable time (u); but if no fraud be proved, an account which has been long settled will not be re-opened *in toto*; the utmost which the Court will then do will be to give leave to surcharge and falsify (x); and there are cases in which, in consequence of lapse of time, the Court will do no more than itself rectify particular items, instead of giving leave to surcharge or falsify generally (y).

If a settled account is impeached for errors, particular errors must be stated and proved (z); and the same rule holds where the account is settled, "errors excepted" (a).

Mistakes of law.

In surcharging and falsifying, errors of law, as well as errors of fact, may be set right (b); and where leave is given to one party to surcharge and falsify, similar leave is thereby also accorded to his opponent (c).

Accounts stated
on the death of
a partner.

On the retirement or death of a partner, it is usual for an account to be stated between him or his representatives on the one hand, and the continuing partners on the other, and for mutual releases to be given. Afterwards attempts are occa-

De G. Mac. & G. 49; *Ex parte Bignold*, 22 Beav. 165. But as to reports without any accounts, see *Portsmouth Banking Co.*, L. R. 2 Eq. 167.

(s) As in *Clarke v. Tipping*, 9 Beav. 284; *Wharton v. May*, 5 Ves. 68; *Beaumont v. Boulton*, ib. 485, and 7 Ves. 599; *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Coleman v. Mellersh*, 2 ib. 309.

(t) *Pitt v. Cholmondeley*, 2 Ves. S. 565; *Vernon v. Vawdry*, 2 Atk. 119.

(u) *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Stainton v. The Carron Co.*, 24 Beav. 346. See *Vernon v. Vaw-*

dry, 2 Atk. 119; *Beaumont v. Boulton*, 5 Ves. 68.

(x) See *Millar v. Craig*, 6 Beav. 433; *Brownell v. Brownell*, 2 Bro. C. C. 61, and 1 Mac. & G. 94.

(y) See *Twogood v. Swanston*, 6 Ves. 485.

(z) *Dawson v. Dawson*, 1 Atk. 1; *Taylor v. Haylin*, 2 Bro. C. C. 310; *Kinsman v. Barber*, 14 Ves. 579.

(a) *Johnston v. Curtis*, 2 Bro. C. C. 311, note.

(b) *Roberts v. Cuffin*, 2 Atk. 112.

(c) 1 Madd. Ch. 144, where it said to have been so held by V.-C. Leach in *Anon.*, 6 March, 1821.

sionally made to open the accounts thus stated, and to set aside the releases, and to have a new account taken, and a fresh settlement of the partnership affairs. In such cases as these, before the settled accounts can be opened, the release must be set aside (*d*). Whether this can be done or not, depends upon circumstances which will be found discussed under the title rescission of contract (*e*).

In taking accounts under an ordinary decree, settled accounts are never disturbed unless specially directed so to be (*f*).

4. *Award*.—Another defence to a bill for an account is, that the matters in difference between the partners have been disposed of by arbitration.

A mere agreement that the matters in question should be referred, has frequently been held to be no defence to an action or suit in respect of them (*g*). But if those matters have actually been disposed of by the award of an arbitrator, they cannot afterwards be made the foundation of any action or suit between the parties on whom the award is binding.

Agreements to refer to arbitration.

An award may be pleaded in bar to a bill for an account (*h*); but such a defence will not avail if the account sought by the bill is different from that to which the award applies (*i*). So an award on a reference of all matters in difference is no defence to a suit for an account of monies received after the making of the award, and not dealt with by it, owing to a mistake on the part of the arbitrator. Thus, in *Spencer v. Spencer* (*k*) the partners on a dissolution referred all matters in difference to arbitration. The arbitrator awarded that one of the partners should get in the outstanding debts, which were estimated by the arbitrator at a certain amount. The award was acted on, but it appeared that the debts ultimately got in

Award.

(*d*) See *Fowler v. Wyatt*, 24 Beav. 232, and see *Parker v. Bloxham*, 20 Beav. 294. R. 139; *Michell v. Harris*, 4 Bro. C. C. 312. See *ante*, p. 852.

(*e*) *Ante*, p. 943, *et seq.*

(*f*) *Newen v. Wetten*, 31 Beav. 315. But see *Milford v. Milford*, MacCl. & Y. 150. (*h*) *Tittenden v. Peat*, 3 Atk. 529; *Routh v. Peach*, 2 Anst. 519, and 3 ib. 637.

(*i*) As in *Farrington v. Chute*, 1 Vern. 72.

(*g*) *Thompson v. Charnock*, 8 T. (*k*) 2 Y. & J. 249.

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amounted to more than the sum at which they had been estimated. One of the partners claimed a share of the difference between the estimated and the actual amount of these debts, and as it was plain that the award had proceeded on a mistake, an account was directed, notwithstanding all matters in difference had been referred.

With respect to agreements to refer, an important enactment is contained in the Common law procedure act, 1854, § 11, as has been already pointed out (*l*).

5. Payment.

5. *Payment, and accord and satisfaction.*—Payment, *per se*, is not a defence to a suit for an account; for the object of such a suit is to ascertain how much is or was payable. But payment of a sum of money and acceptance of it in lieu of all demands, is equivalent to accord and satisfaction, which is as much a defence to a suit for an account as is a release (*m*).

Accord and satisfaction.

With respect to accord and satisfaction, it is to be observed that there must be no uncertainty in the agreement relied on as an answer to the suit for an account, and that it must be shown that such agreement has been performed; for in the performance lies the satisfaction (*n*). On these grounds the late Vice-Chancellor Wigram, in a suit for an account by the executors of a deceased partner against the surviving partner, overruled a plea that it was agreed between the defendant and the deceased that all accounts between them, and all claims of the deceased in respect of the partnership, should be waived; and that in consideration thereof the deceased should be permitted to carry on business alone, without any further question or dispute by the defendant, which the deceased accordingly did (*o*). However, if an agreement to waive all accounts is entered into, and is founded on a sufficient consideration, and is free from all taint of fraud and undue influence, the parties to it will be precluded from suing each other in respect of the accounts so agreed to be waived (*p*).

Brown v. Perkins.

Waiver.

(*l*) *Ante*, p. 852, and see *Wood v. Robson*, 2 Weekly N. 66.

(*m*) See Bac. Ab. Accompt E.; Vin. Ab. Account N.; *Brown v. Perkins*, 1 Ha. 564. But see Com. Dig. Accompt E, 6, pl. 8.

(*n*) Com. Dig. Accord (B. 3) and (B. 4).

(*o*) *Brown v. Perkins*, 1 Ha. 564.

(*p*) See *Sewell v. Bridge*, 1 Ves. Sen. 297. Compare the last case.

6. *Release*.—A release is a good defence to a suit for an account (*q*). But where the release has been executed on the faith of representations as to the correctness of certain accounts, which representations are afterwards ascertained to be untrue, a fresh account will be decreed notwithstanding the release (*r*). A release, moreover, can, of course, be set aside for fraud. A release, to be effectual as such, must be under seal. A release not under seal is regarded as a stated account (*s*).

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6. Release.

3. *Of the decree for a partnership account.*

A decree for a partnership account in its simplest form is to this effect: "Let an account be taken of the partnership dealings and transactions between the plaintiff and the defendant from ——. And let what upon taking the said account shall be certified to be due from either of the said parties to the other of them, be paid by the party from whom to the party to whom the same shall be certified to be due. Liberty to apply" (*t*).

Decrees for account.

(*q*) See Mitford, Pl. 304, ed. 5.

(*r*) See, for example, *Wedderburn v. Wedderburn*, 2 Keen, 772, and 4 M. & Cr. 41; *Millar v. Craig*, 6 Beav. 433, and see *Phelps v. Sproule*, 1 M. & K. 231, and see *ante*, account stated, p. 981.

(*s*) Mitf. Pl. 307, ed. 5. See, as to agreements to waive accounts, *ante*, notes (*o*) and (*p*).

(*t*) Seton on Decrees, 543, ed. 3, where several other useful forms will be found given and referred to. The reports of the following cases also contain useful precedents:—*Devaynes v. Noble*, 1 Mer. 530, account where one firm succeeded another; *Wedderburn v. Wedderburn*, 2 Keen, 752, account where one firm succeeded another, and the capital of a deceased partner was continued in trade; *Cook v. Collingridge*, Jac. 623, and more fully in 27 Beav. 456, note, sale of a testa-

tor's share set aside and account of subsequent profits and good-will; *Crawshay v. Collins*, 12 Ves. 230, and 2 Russ. 347, account of subsequent profits; *Millar v. Craig*, 6 Beav. 442, setting aside a release and opening accounts; *Fereday v. Wightwick*, Tambl. 262, declaration that property acquired by one partner was partnership property, and an account accordingly; *Wilson v. Greenwood*, 1 Swanst. 483, sale, receiver, and account; *Blisset v. Daniel*, 10 Ha. 538, decree restoring a partner wrongfully expelled; *England v. Curling*, 8 Beav. 140, specific performance of agreement for a partnership; *Pillans v. Harkness*, Colles, 442, decree relieving a person who had been induced to become a partner by fraudulent representations; *Evans v. Coventry*, 8 De G. Mac. & G. 835, winding up insurance society ac-

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Costs.

In suits for an account of partnership dealings and transactions, the ordinary rule is to give no costs up to the hearing; nor will this rule be departed from except in cases of gross misconduct on the part of the defendants (*u*). But where the suit is really instituted to try some disputed right, the unsuccessful litigant will be ordered to pay the costs up to the hearing of the cause (*x*). The costs of taking the accounts directed at the hearing are usually defrayed out of the partnership assets, and, if necessary, by a contribution between the partners.

Mode of taking
the accounts.

The method of taking a partnership account under such a decree is as follows:—

1. Ascertain how the firm stands as regards non-partners.
2. Ascertain what each partner is entitled to charge in account with his co-partners, remembering, in the words of Lord Hardwicke, that “each is entitled to be allowed as against the other, everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought (*y*). ”
3. Apportion between the partners all profits to be divided or losses to be made good; and ascertain what, if anything, each partner must pay to the others, in order that all cross claims may be settled.

Matters involved
in taking the
account.

In order, therefore, to take a partnership account, it is necessary to distinguish joint estate from separate estate; joint debts from separate debts; and to determine what gains and what losses are to be placed to the joint account of all the partners, or to the separate accounts of some or one of them exclusively. The principles upon which this is to be done have been explained in previous chapters. Referring the reader, therefore, to them, and reminding him that, in

count against directors for breaches of trust.

(*u*) See *Hawkins v. Parsons*, 8 Jur. N. S. 452, M. R.; *Parsons v. Hayward*, 10 W. R. 531, M. R.

(*x*) *Warner v. Smith*, 9 Jur. 169, V.-C. S. See, as to mutual companies, *Harvey v. Beckwith*, 10 Jur.

N. S. 577.

(*y*) *West v. Skip*, 1 Ves. S. 242. The rule in *Clayton's case* respecting the appropriation of payments applies to partners *inter se* as well as to other persons. See *Toulmin v. Copland*, 3 Y. & C. Ex. 625, and 7 Cl. & Fin. 350.

taking accounts between partners, attention must be paid, not only to the terms of the partnership articles, but also to the manner in which they have been acted on by the partners (z), there remains but little to add on the present subject, except as regards just allowances, the period over which the account is to extend, and the evidence upon which it is to be taken.

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With respect to just allowances.

Just allowances are made, although the decree is silent as to them (a); and when a partnership account is decreed, it is not usual for the Court to determine beforehand what are, and what are not, just allowances. That is determined on taking the account; and, if necessary, the decree will direct the chief clerk to state the facts and reasons upon which he shall adjudge any allowances to be just allowances (b). What ought to be so allowed must be determined by the articles of partnership, and by the principles discussed in a preceding chapter (c).

Just allowances.

With respect to the period over which an account is to extend.

This can only be determined by ascertaining (1) the time from which it is to begin, and (2) the time at which it is to cease.

The time from which the account is to begin, will, in a general account of partnership dealings and transactions, be the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure (d).

1. Time from which the account is to be taken.

(z) See *ante*, pp. 804 and 833, and *Watney v. Wells*, 9 Jur. N. S. 396, M. R. It is said a partner is not to be charged as such with what he might have received, without his wilful default, *Rowe v. Wood*, 2 J. & W. 556, but *quære* whether a surviving partner could not be made so to account, as he alone can get in the assets of the firm. See, also, *Bury v. Allen*, 1

Coll. 604.

(a) See Cons. Orders 26, rule 16.

(b) See *Crawshay v. Collins*, 2 Russ. 347; *Brown v. De Tastet*, Jac. 294, 298, and 299; *Cook v. Collingridge*, Jac. 623, 625; *Wedderburn v. Wedderburn*, 2 Keen, 753.

(c) *Ante*, pp. 758, *et seq.*

(d) See *Cook v. Collingridge*, Jac. 624; *Beak v. Beak*, Rep. Temp. Finch, 190. An incoming partner

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If there has been an account settled so as to be binding on the parties, such account will not be re-opened (*e*). This used to be provided for in the decree by the insertion of the clause, "And if, in taking the said account, it shall appear that any account has been settled and agreed upon between the parties up to any given time, the same is not to be disturbed" (*f*). It is not, however, now usual to insert these words, it not being the practice to disturb settled accounts, unless there is some special direction to that effect (*g*).

Dealings anterior
to commencement
of partnership.

Where partners have had dealings together preparatory to the commencement of their partnership, these dealings cannot be excluded from consideration in taking the partnership accounts. As observed by Lord Langdale in *Cruikshank v. McVicar* (*h*), "Some things must be done by way of preparation for or introduction to the real transactions of the partnership business. Again, when the partnership business is, in one sense, at an end, still you have not therefore put an end to the joint transactions; they must necessarily be carried on, for the purpose of winding up the concern and everything belonging to it. So that when you speak of partnership dealings and transactions you are not to exclude from your consideration those transactions and matters which are necessary by way of introduction or preparation for a partnership dealing, nor are you to exclude those which afterwards follow for the purpose of winding up the concerns of the partnership."

2. Time up to
which the ac-
count is to be
taken.

The time at which an account of partnership dealings and transactions is to stop will, naturally, be the date of the dissolution of the firm (*i*). Not that no account is to be taken of what occurs after that date; for some time or other must elapse between the dissolution and the final winding up of the affairs

has no right to profits made before he became a partner, unless there is an agreement to that effect. *Gordon v. Rutherford*, T. & R. 373. See, as to the statute of limitations, *ante*, pp. 976, *et seq.*

(*e*) See *ante*, p. 981.

(*f*) Seton, 276, ed. 2.

(*g*) *Newen v. Wetten*, 31 Beav.

315. Compare *Milford v. Milford*, MacCl. & Y. 150.

(*h*) 8 Beav. 116.

(*i*) See accordingly, *Beak v. Beak*, Finch, 191, a case of dissolution by death; *Jones v. Noy*, 2 M. & K. 125, a case of dissolution by decree on the ground of lunacy.

of the concern, and such time cannot in fairness to any one be excluded from consideration (*k*). Notwithstanding dissolution, a partnership is deemed to continue so far as may be necessary for the winding up of its affairs (*l*); and an account of partnership dealings and transactions, although in one sense it stops at the date at which the partnership is dissolved, must still be kept open for the purpose of debiting and crediting the proper parties with the monies payable by or to them in respect of fresh transactions incidental to the winding up, as well as in respect of old transactions engaged in prior to the dissolution (*m*).

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Moreover, upon the retirement, bankruptcy or death of a partner, it often happens that the continuing or surviving partner carries on the partnership business without coming to any settlement of the partnership accounts, and without paying out the share of the late partner. When this is done, and no agreement is made as to the terms on which the capital of the late partner is to be left in the concern, the late partner, or those representing him, are, in the absence of special circumstances, entitled to a share of the profits made since the dissolution.

Subsequent profits when a dead or retired partner's capital has been left in the concern.

The first case of importance on this subject is *Crawshay v. Collins* (*n*). There one partner had become bankrupt, and the solvent partners had carried on the business without paying out the bankrupt's share of the assets, and an inquiry was directed with a view to ascertain whether profits made subsequently to the bankruptcy were made by the application of the funds which then constituted the capital of the concern (*o*), or

Bankruptcy.
Crawshay v. Collins.

(*k*) See *per* Lord Eldon in *Crawshay v. Collins*, 2 Russ. 345; *Hale v. Hale*, 4 Beav. 375.

(*l*) See as to this, *ante*, pp. 415, *et seq.*

(*m*) See *Willett v. Blandford*, 1 Ha. 270; and as to the difference between the accounts before and after the date of dissolution, see *Watney v. Wells*, 9 Jur. N. S. 396, and 2 Weekly N. 48. See, also, *Booth v. Parks*, 1 Moll. 465, and *ante*, 790 and 823.

(*n*) 15 Ves. 218; 1 J. & W. 267; and 2 Russ. 325. The decision in 15 Ves. 218, was afterwards said by Lord Eldon not to have gone to the extent ordinarily supposed. See Jac. 296 and 622, and 2 Russ. 330. *Brown v. Vidler*, cited in 15 Ves. 223, and 2 Russ. 340, is an earlier case in point. See, too, *Brown v. Litton*, 1 P. W. 141, and 10 Mod. 20; *Hammond v. Douglas*, 5 Ves. 539.

(*o*) 15 Ves. 218.

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by the application of any other, and what funds; and the master was directed to distinguish between capital and stock in trade (*p*). The object of this inquiry was to ascertain, whether the profits made after the dissolution, were actually made by the application of the funds that belonged to the bankrupt as a member of the partnership (*q*). And it appearing that such profits were made, it was held by Lord Eldon, and afterwards by Lord Lyndhurst (on a re-hearing), that the assignees had a right to a share of these profits, and that the account could not stop until the claims of the assignees were satisfied. The bankrupt was originally entitled to three-eighths of the partnership assets, and although he was indebted to the firm, so that the sum actually payable to him was less than three-eighths of the net assets of the firm, and although the continuing partners had brought in a large additional capital since the bankruptcy, still the assignees were held entitled to be credited throughout with three-eighths of the profits, being debited with what the bankrupt owed. The decree in this important case declared that the three-eighth parts or shares of the bankrupt in the partnership ought to be considered as continuing notwithstanding, and after his bankruptcy; and that the assignees were entitled to three-eighth parts of the profits which had been already reported to have been made; and three-eighth parts of such further profits as (on taking the further accounts thereby directed) should appear to have been made (*r*).

Death.

*Brown v. De
Tastet.*

So, in *Brown v. De Tastet* (*s*), where one partner died and the survivor carried on the partnership business without accounting for the share of the deceased to his administratrix, an account was directed at the suit of the administratrix, not only of the dealings and transactions of the partners up to the death of the deceased partner, but also of the property of the

(*p*) 1 J. & W. 267.

(*q*) 2 Russ. 337.

(*r*) 2 Russ. 347. It is said in 2 M. & K. 658, that this case was affirmed by the House of Lords, and after all to have been abandoned by the plaintiff, who found it impossible to work out the

decree.

(*s*) Jac. 284. See, too, *Knox v. Gye*, noticed *infra*; *Featherstonhaugh v. Turner*, 25 Beav. 382; *Smith v. Everitt*, 27 ib. 446; *Booth v. Parks*, 1 Moll. 465, and *Beatty*, 444.

deceased in the hands of the surviving partner, and of all profits and gains made by him by means of such property.

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The rule established in these cases has been since applied in a variety of instances; *e. g.*, where a managing partner had continued the business after the period fixed for the dissolution and winding up of the partnership (*t*); where a partner had become lunatic and the firm had been dissolved, but the business had been continued by the other partners, and they had not paid out the capital of the lunatic partner (*u*); where partners had agreed to dissolve and to have the partnership business wound up, and its assets got in and converted by a third person, and one of the partners nevertheless carried on the business in the meantime for his own benefit (*x*); where a mining partnership had been dissolved, but one of the partners had obtained a renewed lease of the mine, and had continued to work it for his own benefit (*y*).

Other instances.

The above cases clearly establish the doctrine that where capital of a late partner has been employed in carrying on the business of the concern, so much of the subsequent profits as can be attributed to the employment of that capital must be accounted for, by those who have used it. It is not, however, so clear what the principle is on which this doctrine is based. It may be supported on the mere ground of ownership, in conformity with the maxim, *accessorium sequitur suum principale* (*z*), or upon the ground that the employment of the capital is in the nature of a breach of trust (*a*). In most of the cases this latter ground seems to have been adopted. The capital of a late partner has been treated as trust property; the continuing or surviving partners, by keeping it in their own hands knowing that it did not belong to them, have been held guilty of a breach of trust, and liable to account like any other trustee who wrongfully employs in trade the property of his *cestui que trust*.

Principle of the foregoing cases.

(*t*) *Parsons v. Hayward*, 31 Beav. 199, affirmed on appeal, 10 W. R. 654.

Hall, 2 De G. & J. 173.

(*z*) See Sir Sam. Romilly's argument, in 15 Ves. 224. See, also, 22 Beav. 100.

(*u*) *Mellersh v. Keen*, 27 Beav. 236.

(*a*) See *Booth v. Parks*, 1 Moll. 645; *Docker v. Somes*, 2 M. & K. 655.

(*x*) *Turner v. Major*, 3 Giff. 442.

(*y*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298. See, too, *Clements v.*

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In conformity with this principle partners continuing to carry on business without coming to an account with their late partner, or those who represent him, are liable to be charged either with the profits made by the use of his capital, or with interest on it at 5*l.* per cent., at the option of those to whom such capital belongs (*b*); but in taking an account of subsequent profits, the partner by whose exertions they have been made is usually allowed compensation for his trouble (*c*), unless he is, in the proper sense of the word, a trustee, and guilty of a breach of trust, when no such compensation is allowed (*d*).

Cases in which
there is a breach
of trust.

In the foregoing cases it will be observed there was no relationship of trustee and *cestui que trust* (as distinguished from that of late partnership) subsisting between the persons who made the profits and those who were held entitled to share them. Where, however, as frequently happens, the continuance of a partner's capital in the business of the firm is a clear breach of trust in the proper sense of the expression, the right of the *cestuis que trustent* to an account of profits made by the use of the capital, or at their option to interest on it at 5*l.* per cent., is still more clear and indisputable.

Account of sub-
sequent profits
against executors
who are surviv-
ing partners.

The principal decisions on this subject relate to the rights of the legatees and next of kin of a deceased partner against his executors where they are themselves surviving partners or have themselves become partners since his death. Of these cases, the most instructive are *Cook v. Collingridge*, *Townend v. Townend*, *Wedderburn v. Wedderburn*, *Simpson v. Chapman*, and *Knox v. Gye*. The three last will be referred to presently. The other two were as follows.

*Cook v. Col-
lingridge.*

In *Cook v. Collingridge* (*e*), the executors of a deceased

(*b*) *Booth v. Parks*, 1 Moll. 465, and Beatty, 444. See, also, *Clements v. Hall*, 2 De G. & J. 186; *Toulmin v. Copland*, 2 Ph. 711, reversing S. C., 4 Ha. 41, where a supplemental bill was filed to obtain the benefit of this option. As to the necessity of this, however, see *Booth v. Parks*, *ubi supra*.

(*c*) *Brown v. De Tastet*, Jac. 284. See, also, *ib.* 623; *Featherstonhaugh v. Turner*, 25 Beav. 382; *Mellersh*

v. Keen, 27 *ib.* 242.

(*d*) *Stocken v. Dawson*, 6 Beav. 371, and 9 *ib.* 247; *Burden v. Burden*, 1 V. & B. 170. See, however, *Cook v. Collingridge*, Jac. 622, 623.

(*e*) Jac. 607. See the decree in 27 Beav. 456. *Stocken v. Dawson*, 9 Beav. 239, and on appeal 17 L. J. Ch. 282, was a somewhat similar case.

partner sold their testator's share to the surviving partners, who resold it to one of the executors. The sale was set aside at the instance of a legatee, and an account of profits made subsequently to the death of the deceased partner was decreed.

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In *Townend v. Townend* (*f*), three brothers, A., B., C., were in partnership, under articles by which it was provided that the capital of the partners should not be withdrawn until the expiration of seven years from that date; that in case of the death of one of the partners within that term, a valuation of his share should be made, and that the surviving partners should pay to his representatives the amount of such valuation within three years from the said term of seven years, and in the meantime give sufficient security for the same by a mortgage of a competent part of the partnership property. It was also provided that it should not be lawful for the representatives to commence any action for recovering payment of the share of the deceased, until the end of three years after the expiration of the term of ten years, nor to claim any participation in the profits made after the day up to which the valuation was made; the expressed intention being that the representatives of the partner dying should take 5% per cent. on the value of the share in lieu of profits. It was further provided that nothing should prejudice the right of the representatives within the term of seven years, to take any proceedings in order to obtain a fair valuation, or to obtain and enforce the mortgage security. In April, 1844, A. died, having by will devised his real and personal estate to B., C., and D. upon trust, to raise the sum of 12,000*l.* and invest the same in government or real security, and apply the proceeds towards the maintenance and education of the plaintiff, his then infant daughter, and accumulate the surplus at compound interest; and upon his daughter attaining twenty-one, to pay the accumulations to her, and to stand possessed of the capital on trust, to pay her the proceeds during her life. The testator's estate consisted almost entirely of his share in the partnership. In December, 1844, a valuation was made, by which the testator's share was ascertained to be 20,000*l.* and upwards. In June,

Townend v.
Townend.

(*f*) 1 Giff. 201.

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1853, being more than ten years from the date of the articles, certain hereditaments, consisting of freeholds, leaseholds, and machinery (part of the partnership assets), were mortgaged by B. to C. and D., as a security for the 12,000*l.* (g). The plaintiff came of age in 1857, and in 1858, B. and C. rendered to her an account of the trust funds, in which they debited her with various items for maintenance and education, with 5*l.* per cent. interest thereon, and credited her with the sum of 12,000*l.* and interest at 5*l.* per cent. with yearly rests, up to the 1st May, 1853, and thenceforth with interest at 4*l.* per cent. with yearly rests. The plaintiff, however, insisted that the 12,000*l.* had been continued in the partnership business, and she filed a bill against B., C., and D. for an account of the profits made in the partnership business on the sum of 12,000*l.* from the testator's death, and for payment of what should be found due to the plaintiff, alleging that the mortgage was an improper security. The Court held, 1, That the plaintiff was entitled to an account of the legacy of 12,000*l.*, with interest at 5*l.* per cent. from one year after the testator's death up to the 1st January, 1849 (ten years from the date of the articles), and with compound interest on the surplus, after allowing for sums expended for her maintenance and education; 2, that the plaintiff was entitled to an account of the profits made by the partners from the 1st January, 1849, on the balance found due for the principal at that date, with interest at 5*l.* per cent. and annual rests; 3, that she was entitled to a decree for payment of what should be so found due; and, 4, that the entry of the sum of 12,000*l.* in the account furnished by B. and C. must be taken as conclusive against them that they had such a sum in their hands. It was considered that the mortgage had not the effect of withdrawing the 12,000*l.* from the business: it was part of a plan for keeping the money in the business; and the 12,000*l.* ought not to have been left on the security of property from which the trustees ought to have recovered it.

Limits to the
rule respecting
subsequent
profits.

Although, as appears from the foregoing cases, profits made after a dissolution of partnership, but before its affairs have been finally wound up and its accounts adjusted, belong not

(g) The property, so far as it security, was not an adequate security, could be regarded as an authorised security for 12,000*l.*

only to the partners making them, but also to their late partners and their representatives, yet there is very great difficulty in determining how the share of the latter ought to be ascertained. It is very easy to say they can be calculated by the rule of three—as the whole capital is to the whole profits, so is the late partner's share in the capital to his share of the profits—but this assumes that the profits in question have been made by capital only. Profits, and very large profits, may be made by skill, and an extensive connection, with little or no capital; and even if there be capital, the profits may be attributable less to it than to other matters, and it may be impossible to determine with any precision the extent to which the capital has contributed to the realisation of the profits obtained (*h*). Special inquiries on this subject, therefore, are almost always necessary, and if it can be shown that, having regard to the nature of the business or other circumstances, the profits which have been made cannot be justly attributed to the use of the capital or assets of the late partner, his *prima facie* right to share such profits will be effectually rebutted.

The extent of the liability to account for subsequent profits was elaborately discussed by the late V.-C. Wigram in *Willet v. Blanford* (*i*), and the conclusion arrived at by him was, that no general rule could be laid down upon the subject, and that every case must depend on its own circumstances. "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the late partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties." This conclusion of the Vice-Chancellor was entirely in accordance with previous decisions (*k*), and has been approved by subsequent judges; and in conformity therewith several cases have since been decided, in which profits acquired after the death of a partner were held to belong wholly to those by whose labour they had been made. The

Willet v. Blanford.

(*h*) This difficulty was felt very strongly in *Featherstonhaugh v. Turner*, 25 Beav. 382, noticed *infra*, p. 999.

(*i*) 1 Ha. 253.

(*k*) See in particular Lord Eldon's observations on *Crawshay v. Collins*, in Jac. pp. 622 and 297, and 2 Russ. 330.

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Simpson v. Chapman.

first of these was *Simpson v. Chapman* (1). There three persons were partners as bankers. The bank was in such good credit as to render no capital necessary for the purpose of carrying it on. One of the partners died, leaving his son, one of the surviving partners, and a third person, his executors. At the time of his death the assets of the bank exceeded its liabilities. The estate of the deceased was a creditor of the bank to the extent of his share, viz., one-third of its net assets, but there was a much larger sum owing from his estate to the bank on his overdrawn private account. The son, being also an executor of the deceased, was admitted as a partner in the bank, and the business was carried on by the son and surviving partners, but the amount of the deceased's share in the business was never paid out, or separated from the monies of the bank. Considerable profits were made by the new partnership, and of these the son, as partner, received his share. A suit was instituted for the administration of the estate of the deceased, but to such suit the executors alone were defendants, and a decree was made charging the son, and the surviving partner, who was an executor, in respect of the profits of the bank from the death of the deceased, paid to the son, so far as such profits had accrued from the assets of the deceased employed in the partnership. This part of the decree was appealed from and reversed, and one of the grounds for the reversal was, that the profits acquired after the death of the deceased could not be attributed to the use made of his capital. If the debt due from him to the bank were omitted from its assets, the bank was at his death insolvent. The deceased had no capital in it in the ordinary sense of the word, and all the profits which had accrued were attributable to the connection and reputation of the bank. It was urged that the son, who had received one-third of the profits, and who could not distinguish how much of them was attributable to his character of executor, and how much belonged to him in his individual character as partner, ought to be charged with the whole.

(1) 4 De G. Mac. & G. 154. This case is the more important as the non-liability to account or subsequent profits was decided on the hearing of the cause. See, too, *Knox v. Gye*, noticed *infra*.

But it was held that this principle did not apply, inasmuch as he did not carry on the business as an executor, but in his own separate and individual right, conceiving that he was entitled so to carry it on.

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Another of the cases above referred to, was *Wedderburn v. Wedderburn* (m). There three persons were partners as merchants; one died, leaving the other two and his widow his executors. The surviving partners alone proved the will, and they drew up an account of the partnership assets and credited the estate of the deceased with a certain sum as his share in the concern, but this share was never separated from the assets of the continuing firm. Several changes afterwards took place in the new firm, and then a suit was instituted by persons interested in the estate of the deceased partner, against the executors and surviving partners of the deceased, praying for an account of his estate, and for an account of the gains and profits made by carrying on the partnership after his death. A decree was made directing an account of the personal estate of the deceased partner; and of the dealings and transactions of the firm up to his death; and of what at that time was the value of his interest in the concern; and of the profits of the trade carried on by the succeeding firms; and of the monies which were from time to time taken out of the concern and applied on account of the estate of the deceased; and of the amount of capital from time to time employed in the said firms respectively (n). It appeared that at the death of the deceased the assets of the firm consisted almost entirely of debts due to it; that it was impossible, except at a great sacrifice, to get in these debts in a short time; that if an attempt had been made to wind up the affairs of the concern at the death of the deceased, the assets of the firm would not have sufficed to discharge its liabilities; and that the ultimate solvency of the firm was attributable to the cautious and prudent conduct of the surviving partners, and to their having, from time to time, provided large sums of money to meet pressing liabilities (o). It thus, in fact, appeared that the profits made since the death of the deceased were made by the

Wedderburn v.
Wedderburn.

(m) 2 Keen, 722; 4 M. & Cr. 41;
and 22 Beav. 84.

(n) 2 Keen, 752.

(o) See 22 Beav. 84.

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credit and connection of the house, and by the reputation, skill, and ability of the surviving and later partners, and were not attributable to the surplus assets of the firm in which the deceased had a share. It further appeared that the share of the deceased had been preserved entirely by the prudent management of the executors, and would have been certainly reduced to nothing if they had wound up the affairs of the house in the ordinary way, or had thrown the estate of the deceased into Chancery. Under all the circumstances of the case it was therefore held that as by the partnership articles the plaintiffs had no interest in the good-will of the concern, they were not entitled to participate in the profits made by the successive firms, so far as those profits were attributable to the good-will and connection in trade of the old firm, and that their share in any profits attributable to any other source was covered by interest on the amount at which the share of the deceased had been valued.

Laches in such cases.

Again, where a partner or the representatives of a late partner claim profits subsequent to the time of dissolution, the Court will be much influenced by the laches and delay of the plaintiff; and although his laches may not be sufficient to amount to a defence to a suit for an account, yet it may be amply sufficient to preclude the plaintiff from obtaining all he asks. This is well illustrated by the recent case of *Knox v. Gye* (p). There one Thistlethwaite and the defendant were partners in the Royal Italian Opera, Covent Garden. Thistlethwaite bequeathed his share to the plaintiff and the defendant, and made them his executors. After Thistlethwaite's death the defendant continued the opera without coming to any account with the plaintiff, and without being requested so to do. After the lapse of about three years the opera-house was destroyed by fire, and the whole of the assets of the late partnership were destroyed, with the exception of a sum of about 3000*l.*, which was not sufficient to cover the liabilities incurred in carrying on the business. The defendant discharged these liabilities by degrees, but he made use of the 3000*l.* in the meantime in opening a new opera. In about

Knox v. Gye.

(p) V.-C. Wood, Dec. 1865.

two years he and others, at an immense expense, built a new opera-house on the site of that burnt down, and opened it. The plaintiff, who was perfectly aware of what was going on, refused to take any part in the new opera. After it had been opened for some time a quarrel arose between the plaintiff and the defendant, and the plaintiff then for the first time demanded an account of Thistlethwaite's share, and of all profits made since his death, and this demand not being conceded, the plaintiff proved Thistlethwaite's will, and then, more than six years after his death, filed a bill as his executor for an account. The defendant relied on the statute of limitations and on the laches of the plaintiff as a defence to the whole suit, but the Court was of opinion that the plaintiff was entitled to an account up to the time of the commencement of the new opera, but not later (*q*).

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The law upon the subject under consideration is still in an unsettled state. Undoubtedly a person ought not to be permitted to retain for his own use, gains acquired by the unlawful employment of another's property; and it would certainly not be conducive to justice if there were no power to compel a discovery of the amount of the gains so made, and payment of that amount by the wrong doer (*r*). At the same time, owing to the extreme difficulty of taking an account of subsequent profits, so far as they are attributable only to one particular source, the tendency of the courts in modern times appears to be rather in favour of not exercising than of exercising the power alluded to, except in cases of gross fraud or breach of trust. In such cases, however, the Court will exert itself to the utmost, and the efforts which it will make in order to prevent persons from deriving advantage from their own wrong, cannot be better illustrated than by the recent case of *Featherstonhaugh v. Turner* (*s*). The profits of the partnership business there arose entirely from the skill and reputation of the partners, who were medical gentlemen. In order to ascertain the share of the deceased in the profits made after

Observations on
the foregoing
cases.

*Featherston-
haugh v. Turner.*

(*q*) On appeal the statute of limitations was held to be a complete bar. See *ante*, p. 980.

(*r*) See the admirable judgment

of Lord Brougham in *Docker v. Somes*, 2 M. & K. 672.

(*s*) 25 Beav. 382.

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his death by the surviving partner, an inquiry was directed whether any and what profits made since the death of the deceased were attributable to or derived from persons who had become customers by reason of the deceased having been a partner, and it was considered that the surviving partner was liable to pay what might be found due on taking that account, after deducting a liberal allowance to him for his time, knowledge, and expenses in realising the profits in question.

With respect to the evidence upon which the accounts are to be taken.

Evidence on
which accounts
are taken.

As regards the partnership books. These being accessible to all the partners, and being kept more or less under the surveillance of them all, are *prima facie* evidence against each of them, and, therefore, also for any of them against the others (*x*). But entries made by one partner without the knowledge of the other do not prejudice the latter as between himself and his co-partner (*y*); and where a surviving partner drew up an account which he furnished to the executors of his late partner, it was held that such account was admissible against the partner who furnished it, and that the executors were not bound by using it against him, to admit its correctness throughout (*z*).

Special directions
on this subject.

Where, in consequence of the loss of books and documents, an account cannot be taken in the usual way, special directions will be given as to the mode in which the accounts shall be taken and vouched. The power to give such a direction is expressly conferred upon courts of equity by 15 & 16 Vict. c. 86, § 45, by which it is enacted that "It shall be lawful for

15 & 16 Vict. c.
86, § 54.

(*x*) See *Lodge v. Prichard*, 3 De G. Mac. & G. 906, and *Smith v. The Duke of Chandos*, 2 Atk. 158, and Barn. 412. But see the observations of L.J. Turner, in *Stewart's ca.*, L. R. 1, Ch. App. 587.

(*y*) *Hutcheson v. Smith*, 5 Ir. Eq. 117. See, also, *Reeve v. Whitmore*, 2 Dr. & Sm. 446, where it was held that although books kept by a person

may be used against him as showing what he has received, he is not entitled to use them in his own favour to show what he has paid. See, as to how far the books of companies are evidence against their shareholders, *ante*, p. 565.

(*z*) *Morehouse v. Newton*, 3 De G. & Sm. 307.

the court, in any case where any account is required to be taken, to give such special directions, if any, as it may think fit with respect to the mode in which the account should be taken or vouched, and such special directions may be given, either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the Court that the circumstances of the case are such as to require such special directions; and particularly it shall be lawful for the Court, in cases where it shall think fit so to do, to direct that in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised.”

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Prior to the above enactment the Court would, if necessary, direct the Master to make a special report in case he should be unable to take an account by reason of the non-production of books, or other circumstances (*a*); and the Court would, it seems, declare that, for certain purposes, vouchers should not be required (*b*). Since the enactment, it has been decided that no special directions will be given, except in cases of necessity, and where, unless such directions are given, the accounts required cannot be arrived at (*c*).

Old practice.

The decree for an account usually directs that all parties shall produce on oath all books and papers in their custody relating to the taking of the accounts. If any partner has kept accounts relating to the partnership in private books of his own, he must produce such books; for he should have kept his private accounts elsewhere, if he did not want them to be seen (*d*). After a dissolution new books are generally opened, but if they relate to the accounts which have to be

Production of
books, &c.

(*a*) See *Rowley v. Adams*, 7 Beav. 395; *Millar v. Craig*, 6 ib. 444; *Turner v. Corney*, 5 ib. 515. G. Mac. & G. 906; *Ewart v. Williams*, 7 ib. 68.

(*b*) *Adley v. The Whitstable Co.*, 17 Ves. 327. See the decree in *Stainton v. The Carron Co.*, 24 Beav. 363. (*d*) *Toulmin v. Copland*, 3 Y. & C. Ex. 655; *Freeman v. Fairlie*, 3 Mer. 43. Liberty will be given to seal up those parts which are sworn not to relate to the matters in ques-

(*c*) See *Lodge v. Prichard*, 3 De tion in the suit, *ante*, 974.

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taken, they must be produced (*e*), and even if a partner not before the Court, objects to their production, it is by no means clear that his objection will prevail (*f*). As between partners and their representatives, material documents must be produced, though they may be privileged as between them and other persons (*g*).

Consequence of
non-production.

If a partner has books or accounts in his possession, and he will not produce them, an account may, nevertheless, be arrived at by presuming everything against him. Thus, in a case where an account was directed at the suit of the representatives of a deceased partner against the surviving partner, and the latter would not produce the books necessary to enable the Master to take the accounts, the Master estimated the net profits at 10% per cent, on the capital employed, and the Court, on exceptions to his report, confirmed it, adding that if he had set the net profits down at 20% per cent. his report would have been equally confirmed (*h*).

Accountants.

The Court has power to employ professional accountants to assist it in taking accounts, and the Court may act on their report (*i*).

5. Of injunctions and receivers.

Injunctions and
receivers.

In order to prevent a partner from acting contrary to the agreement into which he may have entered with his co-partners, or contrary to the good faith which, independently of any agreement, is to be observed by one partner towards his co-partner, it is sometimes necessary for a court of equity to interfere either by granting an *injunction* against the partner complained of, or by taking the affairs of the partnership out of the hands of all the partners, and entrusting them to a *receiver* and manager of its own appointment.

(*e*) *Hue v. Richards*, 2 Beav. 305. & Lat. 556; and see *Gray v. Haig*,

(*f*) See *Freeman v. Fairlie*, 3 20 Beav. 219.
Mer. 43. But see *ante*, p. 971. (*i*) 15 & 16 Vict. c. 80, § 42; and

(*g*) See *Brown v. Perkins*, 2 Ha. 540, where the excuse of professional confidence was set up. see on it, *Hill v. King*, 1 New Rep. 341, L. C.; *Ford v. Tynte*, 2 De G. J. & Sm. 127; *London, Birmingham, and Bucks Rail. Co.*, 6 W. R. 141.

(*h*) *Walmsley v. Walmsley*, 3 Jo.

These two modes of interference require to be considered separately; for they are not had recourse to indiscriminately. The appointment of a receiver, it is true, always operates as an injunction, for the Court will not suffer its officer to be interfered with by any one (*k*); but it by no means follows that because the Court will not take the affairs of a partnership into its own hands, it will not restrain some one or more of the partners from doing what may be complained of (*l*).

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First, of the remedy by injunction.

1. *Against partners.*

Whatever doubt there may formerly have been upon the subject, it is clear that an injunction will not be refused simply because no dissolution of partnership is sought. In a recent case, a partner who had been suffering from temporary insanity had recovered, but was excluded by his co-partners from the management of the affairs of the partnership. On a bill filed by him against them, praying for an injunction to restrain them from preventing him from transacting the business of the partnership, as a partner, the Court granted the injunction, and thereby restored the plaintiff to his position in the firm (*m*).

Injunction
granted though
no dissolution
is sought.
Restoring ex-
cluded partner.

Again, in *England v. Curling* (*n*), a partnership had been entered into, for a term of years which had not expired. One of the partners insisted on a dissolution and retired from the partnership, and entered into another partnership, which assumed the name of the old firm, opened the letters addressed to it, and circulated notices of its dissolution. But on a bill filed by the continuing partners of the old firm against their co-partner and the other members of the new firm, the Court granted an injunction restraining the retired co-partner from carrying on business with his new partners or any other persons except his old co-partners, until the expiration of the

Restraining im-
proper acts.
England v.
Curling.

(*k*) Although the appointment of a receiver operates as an injunction, the Court will often grant an injunction as well as a receiver, to mark its sense of the impropriety of the conduct of those it specially restrains, see *per V.-C. Kindersley*

in *Evans v. Coventry*, 3 Drew. 82.

(*l*) See *Hall v. Hall*, 3 Mac. & G. 85.

(*m*) *Anon., Z. v. X.*, 2 K. & J. 441.

(*n*) 8 Beav. 129. See, too, *Warder v. Stilwell*, 3 Jur. N. S. 9.

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Hall v. Hall.

term; and restraining his new partners from carrying on business with him, or otherwise, in the name of the old firm, and from receiving or opening letters addressed to it, and from interfering with its property; and restraining the retired partner from publishing or circulating any notice of the dissolution of the old firm, before the expiration of the term for which it had been entered into. So in the subsequent case of *Hall v. Hall* (o), a partnership for twenty-one years, determinable on twelve months' notice by either party (p), was entered into by the plaintiff and the defendant: disputes arose, and the defendant wholly excluded the plaintiff from the partnership business. The plaintiff filed a bill praying that the articles might be performed, and, amongst other things, for an injunction, but not for a dissolution. An injunction was granted, restraining the defendant from applying any of the monies and effects of the co-partnership, otherwise than in the ordinary course of business, and from obstructing or interfering with the plaintiff in the exercise or enjoyment of his rights under the partnership articles.

Where one partner seeks to drive the others to a dissolution.

These authorities show that where a partnership is not determinable at will, those partners who are desirous of carrying on the business in the proper way, will be protected by a court of equity from the unwarranted acts of a co-partner, whose only object may be, by grossly misconducting himself, to force the others to agree to a dissolution (q).

Injunction where the partnership is determinable at will.

Where the partnership is determinable at will, there is, it is said, more difficulty in interfering if a dissolution is not prayed; for, supposing the Court to interfere, the defendant might immediately dissolve the partnership (r). But supposing him to do so, an injunction will not necessarily be futile, inasmuch as so long as it continues in force, the defendant is rendered powerless for evil, and a notice by him to dissolve the partnership cannot, *per se*, operate as a dissolution of the injunction. In *Glassington v. Thwaites* (s), the plaintiff, who

Glassington v. Thwaites.

(o) 12 Beav. 414, 20 ib. 139, and 3 Mac. & G. 79.

(p) See 20 Beav. 139.

(q) See, too, *Fairthorne v. Weston*, 3 Hare, 387.

(r) See *Peacock v. Peacock*, 16 Ves. 49; *Miles v. Thomas*, 9 Sim. 606.

(s) 1 Sim. & Stu. 124.

was one of the proprietors of the Morning Herald, obtained an injunction, restraining his co-partners, who were also proprietors of the English Chronicle (in which, however, the plaintiff had no interest), from publishing in the latter paper, any information obtained at the expense of the former until it should have been first published in the Morning Herald. So in *Morris v. Colman* (t), one of the proprietors of the Haymarket Theatre was restrained from acting contrary to the articles of partnership, by writing plays for other theatres. Again, where a partner had agreed not to sell his share without first offering it to the other partners, an injunction to restrain a sale was granted (u). It does not appear from the reports of these cases whether the partnerships were partnerships at will or not; but supposing them to have been merely partnerships at will, it is clear that the injunctions were far from valueless.

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Morris v.
Colman.

Homfray v.
Fothergill.

In a suit instituted for the purpose of having a partnership dissolved, or of having an account taken after a partnership has been dissolved, it has never been doubted that an injunction will be granted to restrain one of the partners from doing any act which will impede the winding up of the concern. For example, one partner will be restrained from carrying on the concern for any other purpose than winding up (x); from damaging the value of the good-will if it ought to be sold for the benefit of all (y); a surviving partner will be restrained from improperly ejecting the representatives of his deceased co-partner (z); and they, on the other hand, will be restrained from making any improper use of partnership property, the legal estate of which may happen to be in them (a). So a surviving partner will be restrained from disposing of or getting in the partnership assets, if he has already been guilty of breaches of trust with reference to them (b). But a sur-

Injunction in
suits for dis-
solution.

(t) 18 Ves. 437.

(u) *Homfray v. Fothergill*, L. R. 1 Eq. 567.

(x) See *De Tastet v. Bordenave*, Jac. 516.

(y) *Turner v. Major*, 3 Giff. 442; *Bradbury v. Dickens*, 27 Beav. 53.

In the last case the defendant was advertising the discontinuance of a

partnership periodical of which he was the editor.

(z) *Elliot v. Brown*, 3 Swanst. 489, n.; *Hawkins v. Hawkins*, 4 Jur. N. S. 1045.

(a) *Alder v. Fouracre*, 3 Swanst. 489.

(b) *Hartz v. Schrader*, 8 Ves. 317.

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viving partner will not be restrained from continuing to carry on business in the name of himself and his deceased co-partner, unless so to do is contrary to his own agreement, or the good-will is a saleable asset of the firm (*c*). Again, in a suit for a dissolution, a partner has been restrained from improperly interfering with or obstructing the partnership business (*d*); from drawing, accepting, or endorsing bills of exchange in the partnership name for other than partnership purposes (*e*); from getting in debts owing to the firm (*f*); from withholding the partnership books (*g*), and generally, on a dissolution one partner will be restrained from injuring the property of the firm (*h*).

Injunction to protect partners from the representatives of a co-partner.

So the Court will interfere by injunction to protect partners from the interference of persons claiming the share of a late co-partner, by reason of his death, or bankruptcy, or under an execution (*i*).

Injunction to enforce special agreements.

So after a dissolution the Court constantly interferes by injunction to restrain breaches of special agreements entered into between the partners; such for example as agreements not to carry on business (*k*), not to get in debts of the firm (*l*), not to divulge a trade secret (*m*). So, if a partner retires, and assigns his interest in the partnership, and in the good-will thereof, to the continuing partners, he will be restrained from

(*c*) See on his subject, *ante*, p. 838 to 848, and *Banks v. Gibson*, 34 Beav. 566; *Webster v. Webster*, 3 Swanst. 490, n.; *Lewis v. Langdon*, 7 Sim. 421.

(*d*) *Smith v. Jeyes*, 4 Beav. 503; *Charlton v. Poulter*, 19 Ves. 148, n.

(*e*) *Williams v. Bingley*, 2 Vern. 278, note, and Coll. Part. 233; *Jervis v. White*, 7 Ves. 412; *Hood v. Aston*, 1 Russ. 412. In the two last cases, the injunction restrained *malâ fide* indorsees for value from parting with or negotiating the securities.

(*f*) *Read v. Bowers*, 4 Bro. C. C. 441.

(*g*) *Taylor v. Davis*, 3 Beav. 388, note; *Greatrix v. Greatrix*, 1 De G. & Sm. 692; *Charlton v. Poulter*,

19 Ves. 148, n.

(*h*) See *Marshall v. Watson*, 25 Beav. 501, where an injunction to restrain a partner from publishing the accounts of the firm, was under special circumstances refused.

(*i*) See as to assignees in bankruptcy, *Allen v. Kilbre*, 4 Madd. 464; *Fraser v. Kershaw*, 2 K. & J. 496; *Davidson v. Napier*, 1 Sim. 297; *Freeland v. Stansfeld*, 2 Sm. & G. 479. As to sheriffs, *Bevan v. Lewis*, 1 Sim. 376; *Newell v. Townsend*, 6 ib. 419. As to executors, *Phillips v. Atkinson*, 2 Bro. C. C. 272.

(*k*) *Whittaker v. Howe*, 3 Beav. 383.

(*l*) *Davis v. Amer*, 3 Drew. 64.

(*m*) *Morison v. Moat*, 9 Ha. 241.

recommencing or carrying on business in such a way as to lead people to suppose that he is the successor of the old firm (n). Bk. III. Chap. 10.
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Again, if one partner sues another at law, a court of equity will interfere by injunction, if, having regard to the partnership accounts, or the state of the partnership business, it can be shown that the action ought to be restrained on grounds which afford no defence at law. Thus, where surviving partners gave the executors of their late partner a bond for the amount of his share, the amount of which had not been ascertained, an action on the bond was stayed on its being shown that if the partnership accounts were taken it would appear that the surviving partners had already paid too much (o). But a court of equity will not interfere to prevent a shareholder of a company who is a creditor of that company from executing a judgment obtained against it by him as creditor (p). Injunction to re-
strain actions.

Before leaving this subject, it is necessary to make a few observations on the kind of misconduct which will induce the Court to grant an injunction against one partner at the suit of another. Mere squabbles and improprieties, arising from infirmities of temper, are not considered sufficient ground for an injunction (q); but if one partner excludes his co-partner from his rightful interference in the management of the partnership affairs, or if he persists in acting in violation of the partnership articles on any point of importance, or so grossly misconducts himself as to render it impossible for the business to be carried on in a proper manner, the Court will interfere for the protection of the other partners (r). Where, however, Injunction in
case of miscon-
duct.

(n) *Churton v. Douglas*, 1 Johns. 174, *ante*, p. 839.

(o) *Jackson v. Sedgwick*, 1 Swanst. 460. See, also, *Gold v. Canham*, 1 Ch. Ca. 311, and 2 Swanst. 325, note; and as to restraining actions of ejectment, *Elliot v. Brown*, 3 Swanst. 489, note, and *Hawkins v. Hawkins*, 4 Jur. N. S. 1045.

(p) *Rheam v. Smith*, 2 Ph. 726; *Hardinge v. Webster*, 1 Dr. & Sm. 101; and see *Hammond v. Ward*, 3 Drew. 103. See, also, *ante*, p. 857.

(q) See *Marshall v. Colman*, 2 J. & W. 266; *Smith v. Jeyes*, 4 Beav. 503; *Lawson v. Morgan*, 1 Price, 307; *Coyton v. Hornor*, 5 Price, 537; *Warder v. Stilwell*, 3 Jur. N. S. 9.

(r) See *ante*, p. 232, 233. In *Anderson v. Wallace*, 2 Moll. 540, one of several partners who horsed a mail coach was restrained from horsing it on the ground that he did it so badly as to imperil the business of the concern.

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the partner complained of has by agreement been constituted the active managing partner, the Court will not interfere with him unless a strong case be made out against him (s); nor will the Court restrain a partner from acting as such, merely because if he is known so to do, the confidence placed in the firm by the public will be shaken (t).

Partner applying for injunction must come with clean hands.

It need scarcely be observed that a partner who seeks an injunction against his co-partner must himself be able and willing to perform his own part of any agreement which he seeks to restrain his co-partner from breaking (u); and the plaintiff's own misconduct may be a complete bar to his application, however wrong the defendant's conduct may have been (x). As stated by Lord Eldon in *Const v. Harris*, a partner who complains that his co-partners do not do their duty to him, must be ready at all times, and offer to do his duty to them (y).

Injunction to restrain holding out.

In consequence of the liability which attaches to a person who holds himself out as a partner with others, and of the danger run by a person who is held out as a partner with others, even although it may not be with his consent, a court of equity will it seems interfere and restrain a person from holding out another as partner with him, without the authority of that other (z). And if a person is, without his authority, advertised by the promoters of a company as a trustee of the company, an injunction against them will be granted (a). Upon the same principle, if a person's name is wrongfully placed on a company's register of shareholders, he is entitled to an injunction to restrain its continuance there (b).

(s) See *Lawson v. Morgan*, 1 Price, 303; *Waters v. Taylor*, 15 Ves. 10.

(t) *Anon.*, 2 K. & J. 441.

(u) *Smith v. Fromont*, 3 Swanst. 330.

(x) *Littlewood v. Caldwell*, 11 Price, 97, where an injunction was refused because the plaintiff had taken away the partnership books.

(y) *Const v. Harris*, T. & R. 524.

(z) See *Routh v. Webster*, 10

Beav. 561; *Bullock v. Chapman*, 2 De G. & Sm. 211; *Troughton v. Hunter*, 18 Beav. 470. Compare *Banks v. Gibson*, 34 Beav. 566.

(a) *Routh v. Webster*, 10 Beav. 561.

(b) See *Bullock v. Chapman*, 2 De G. & Sm. 211, where, however, no injunction was granted. Under the Companies act, 1862, the remedy would be under § 35.

2. *Against directors, &c.*

With respect to injunctions against companies and their directors, little remains to be added to what was said when considering the principles by which courts of equity are guided in interfering in matters of internal management (c), and in controlling majorities (d). In order, however, to facilitate reference, it will be convenient to collect those cases in which an injunction has been granted or refused, although they may have been noticed in previous pages.

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against com-
panies and their
directors.

In relying upon the authorities here collected, it is to be borne in mind that, before the hearing of a cause, a court of equity will not restrain the exercise of a clear legal right, unless it is satisfied that it will be compelled to do so at the hearing (e); nor will it interfere, if it is not in the possession of all the material facts, and convinced that an immediate injunction is imperatively required (f).

Injunctions be-
fore the hearing
of the cause.I.—*An injunction has been granted to restrain—*Injunctions
granted.

1. The improper insertion or continuance of a person's name on a company's prospectus (g) or on the register of shareholders (h);
2. The registry of an improper transfer of shares (i);
3. The making of calls for illegal purposes (k);
4. The making of calls on a shareholder induced to become such by fraud (l);

(c) *Ante*, p. 894, *et seq.*(d) *Ante*, p. 601, *et seq.*(e) *Playfair v. Birmingham, &c., Rail. Co.*, 1 Ra. Ca. 640.(f) *Fielding v. Lancashire, &c., Rail. Co.*, 2 De G. & S. 531.(g) *Routh v. Webster*, 10 Beav. 561.(h) *Taylor v. Hughes*, 2 Jo. & Lat. 24; *Shortridge v. Bosanquet*, 16 Beav. 84. Compare *Bullock v. Chapman*, 2 De G. & S. 211. This is now usually done by an application to rectify the register, as to which see *ante*, p. 145.(i) *Fyfe v. Swaby*, 16 Jur. 49.(k) See as to this, *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, and *Hodgkinson v. National Live Stock Insur. Co.*, 26 Beav. 473, and 4 De G. & J. 422, both of which, however, were decided on demurrer. See further on this subject, *Orr v. Glasgow Rail. Co.*, 3 MacQu. 799, and the other cases cited *infra*, under the next head, Nos. 2 to 6.(l) *Smith v. Reese River Co.*, L. R. 2 Eq. 264; *Bloxam v. Metrop. Cab Co.*, 4 New Rep. 51.

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Injunctions
granted.

5. The illegal issue of shares (*m*); *e.g.*, preference shares issued pursuant to a special resolution (*n*);

6. The illegal forfeiture of shares (*o*);

7. The unfair use by a company of a creditor's name in an action against a shareholder (*p*);

8. The illegal suspension of a shareholder from his rights (*q*);

9. The illegal payment of dividends not actually declared (*r*), *ex. gr.*, payment of dividends out of capital or borrowed money (*s*);

10. The making of loans to directors (*t*);

11. The departure by a company from the prosecution of the objects to attain which it was formed; viz., to restrain

A fire and life insurance company from engaging in marine insurances (*u*);

A railway company from dealing extensively in the purchase and sale of coals (*x*);

A railway company from guaranteeing the payment of dividends by a steam packet company (*y*); so,

From taking an unauthorised number of shares in another railway company (*z*); so,

From making a different railway from that which it was incorporated to make (*a*);

(*m*) *Fraser v. Whalley*, 2 Hem. & M. 10. See *infra*, under second head, No. 8.

(*n*) *Hutton v. Scarboro' Cliff Co.*, 2 Dr. & Sm. 514 and 521.

(*o*) *Watson v. Eales*, 23 Beav. 294; *Norman v. Mitchell*, 5 De G. Mac. & G. 648; *Naylor v. South Devon Rail. Co.*, 1 De G. & Sm. 32.

(*p*) *Taylor v. Hughes*, 2 Jo. & Lat. 24, and other cases cited, *ante*, p. 861.

(*q*) *Adley v. Whitstable Co.*, 17 Ves. 315; 19 ib. 304; 1 Mer. 107.

(*r*) *Fawcett v. Laurie*, 1 Dr. & Sm. 192; *Carlisle v. South Eastern Rail. Co.*, 1 Mac. & G. 689; *Henry v. Great Northern Rail. Co.*, 4 K.

& J. 1, and 1 De G. & J. 606, and other cases cited, *ante*, p. 781.

(*s*) *McDoughal v. Jersey Hotel Co.*, 2 Hem. & M. 528.

(*t*) *Bluck v. Malaloe*, 27 Beav. 398.

(*u*) *Natusch v. Irving*, *ante*, p. 605.

(*x*) *A.-G. v. Great Northern Rail. Co.*, 1 Dr. & Sm. 154.

(*y*) *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1.

(*z*) *Salomons v. Laing*, 12 Beav. 377.

(*a*) *Bagshaw v. Eastern Union Rail. Co.*, 7 Ha. 114, and 2 Mac. & G. 389; *Simpson v. Denison*, 10 Ha. 51.

Or part only of such railway (b);

Or one only out of several railways which it had been formed to make (c);

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Injunctions
granted.

12. The transfer, by one company, of its business to another company (d);

13. The amalgamation of two companies having similar objects (e);

14. A company and its directors from applying to Parliament, at the expense of the company, for power to do what it was not formed to do (f);

15. A chartered company from surrendering its charter (g);

16. The publication of the contents of books and documents inspected under an order (h);

17. The payment out of the funds of a company of money borrowed by its promoters, to enable them to comply with the standing orders of the House of Lords (i);

18. Proceeding to arbitration under an *ultra vires* agreement (k).

II.—*An injunction has been refused to restrain—*

Injunctions
refused.

1. A company from commencing business on a smaller scale than contemplated by the prospectus, or before its nominal capital had been subscribed (l);

(b) *Cohen v. Wilkinson*, 12 Beav. 125, and 1 Mac. & G. 481; *Logan v. Courtown*, 13 Beav. 22.

(c) *Hodgson v. Powis*, 12 Beav. 392 and 529, and 1 De G. Mac. & G. 6.

(d) *Charlton v. Newcastle and Carlisle Rail. Co.*, 5 Jur. N. S. 1096; *Beman v. Rufford*, 1 Sim. N. S. 550; *Winch v. Birkenhead, &c., Rail. Co.*, 5 De G. & S. 562. See, too, *Salomons v. Laing*, 12 Beav. 377; *Hattersley v. Shelburne*, 10 W. R. 801, V.-C. K., where it was intended to obtain an act to legalise the transfer.

(e) *Kearns v. Leaf*, 1 Hem. & M. 681; *Gilbert v. Cooper*, 10 Jur. 580, V.-C. E. See, also, the last note.

(f) *Munt v. Shrewsbury and Chester Rail. Co.*, 13 Beav. 1; *Simp-*

son v. Denison, 10 Ha. 51; *Great Western Rail. Co. v. Rushout*, 5 De G. & Sm. 290; *Vance v. East Lanc. Rail. Co.*, 3 K. & J. 50. See, also, *A.-G. v. Norwich*, 16 Sim. 225, and compare *Bateman v. Mayor of Ashton-under-Lyne*, 3 H. & N. 323.

(g) *Ward v. Society of Attornies*, 1 Coll. 370, as to which, see *ante*, 611.

(h) See *Williams v. Prince of Wales Co.*, 23 Beav. 338.

(i) *Spackman v. Lattimore*, 3 Giff. 16.

(k) *Maundsell v. Midland Great Western Rail. Co.*, 1 Hem. & M. 130.

(l) *McDoughal v. Jersey Hotel Co.*, 2 Hem. & M. 528.

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Injunctions
refused.

2. The making of calls by a company commencing business with less capital than that originally contemplated (*m*);
3. The making of necessary calls by directors who had been guilty of improper conduct (*n*);
4. The making of calls on some only of the members of an amalgamated society (*o*);
5. The making of calls on all the members of two amalgamated companies, to pay the debts of one of such companies (*p*);
6. Actions for calls on improperly relinquished or forfeited shares (*q*);
7. The borrowing of money by a limited company (*r*);
8. The issuing of preference shares (*s*);
9. The application of the money raised by the issue of preference shares to a purpose different from that for which it was raised (*t*);
10. The return of deposits to subscribers (*u*);
11. The payment of dividends actually declared (*x*);
12. The payment of dividends before payment of debts (*y*);
13. The payment of dividends before the completion of the company's works (*z*);
14. The continuance in office of directors appointed in the place of others removed (*a*);

(*m*) *Norman v. Mitchell*, 19 Beav. 278, and 5 De G. Mac. & G. 648.

(*n*) *Logan v. Courtown*, 13 Beav. 22.

(*o*) *Bailey v. Birkenhead, &c., Rail. Co.*, 12 Beav. 433. Compare *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, and see No. 15, *infra*.

(*p*) *Cooper v. Shropshire Union Rail. Co.*, 6 Ra. Ca. 136; S. C., 13 Jur. 443.

(*q*) *Harris v. North Devon Rail. Co.*, 20 Beav. 384; *Playfair v. Bristol, &c., Rail. Co.*, 1 Ra. Ca. 640.

(*r*) *Bryon v. Metropolitan Saloon Omnibus Co.*, 4 Jur. N. S. 680, and on appeal, 3 De G. & J. 123. See No. 15.

(*s*) *Edwards v. Shrewsbury, &c., Rail. Co.*, 2 De G. & Sm. 537. See under first head, No. 5.

(*t*) *Yetts v. Norfolk Rail. Co.*, 3 De G. & Sm. 293. See No. 15, *infra*.

(*u*) *Kent v. Jackson*, 14 Beav. 367, and 2 De G. Mac. & G. 49.

(*x*) *Fawcett v. Laurie*, 1 Dr. & Sm. 192; the suit, however, was defective, for want of parties. See *ante*, p. 924.

(*y*) *Stevens v. South Devon Rail. Co.*, 9 Ha. 326. See No. 15.

(*z*) *Browne v. Monmouthshire, &c., Rail. Co.*, 13 Beav. 32. See No. 15.

(*a*) *Inderwick v. Snell*, 2 Mac. & G. 216.

15. The management of a company's affairs by directors whose conduct was complained of; no sufficient attempt having been made to control them before applying to the Court (b);

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Injunctions
refused.

16. Directors improperly appointed, from acting (c);

17. Directors from putting their own names on negotiable instruments relating to the affairs of the company (d);

18. The sailing of a ship on a voyage disapproved of (e);

19. The assignment of a company's property to trustees, upon trust to sell and pay the company's debts (f);

20. The total abandonment by [a railway company of its works, it not having funds to complete them (g);

21. The application to parliament, otherwise than at the expense of the company, for power to enable the company to do what it was never intended it should do (h), though the application is in the name and under the seal of the company (i);

22. The sealing of an agreement to make such an application (k);

23. A company from applying to a foreign legislature for increased powers (l);

24. An application to Parliament to legalise an agreement for the transfer of the business of one company to another (m);

25. A railway company empowered to purchase a canal, from exercising the powers of a canal company (n);

(b) *Carlen v. Drury*, 1 V. & B. 142; *Waters v. Taylor*, 15 Ves. 10; *Foss v. Harbottle*, 2 Ha. 461; *Mozley v. Alston*, 1 Ph. 790. This principle was acted on in the cases cited under Nos. 4, 5, 7, 8, 9, 12, 13.

(c) *Hattersley v. Shelburne*, 10 W. R. 881, V.-C. K.

(d) *Bluck v. Malalue*, 27 Beav. 398.

(e) *Miles v. Thomas*, 9 Sim. 606.

(f) *Lord v. Governor and Co. of Copper Miners*, 2 Ph. 740.

(g) *Logan v. Courtown*, 13 Beav. 22.

(h) *Ware v. Grand Junc. Water-*

works Co., 2 R. & M. 470, ante, p. 611.

(i) *Great Western Rail. Co. v. Rushout*, 5 De G. & Sm. 290. Compare *Maundsell v. Midland Great West. Rail. Co.*, 1 Hem. & M. 130.

(k) *Winch v. Birkenhead Rail. Co.*, 5 De G. & Sm. 580.

(l) *Bill v. Sierra Nevada Mining Co.*, 1 De G. F. & J. 177.

(m) *Hattersley v. Earl of Shelburne*, 10 W. R. 881, V.-C. K.

(n) *Rogers v. Oxford, &c. Rail. Co.*, 2 De G. & J. 662.

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26. A railway company having steam ferry-boats from using them for other than ferry purposes when not wanted for those purposes (o);

27. A railway company from carrying out a traffic agreement entered into with another company (p);

28. An hotel company from temporarily letting part of its hotel for other than hotel purposes (q);

29. A fire insurance company from paying for losses usually paid for but not covered by its policies (r);

30. The discharge of a servant whose engagement was provided for in the company's articles of association (s);

31. The non-registry of a transfer of shares (t).

Suits by nominees of rival companies.

With reference to injunctions against companies, it may be observed, that although a person who purchases a share in a company simply for the purpose of instituting a suit against it is not guilty of maintenance (u), yet in *Forrest v. Manchester, &c., Railway Company* (x), Lord Westbury refused relief to a shareholder who filed a bill on behalf of himself and his co-shareholders, not *bonâ fide* for the purpose of protecting the interests of those he assumed to represent, but for the purpose of furthering the design of a rival company whose puppet he really was (y).

Secondly, of the appointment of a receiver.

Object of having a receiver.

The object of having a receiver appointed by the Court is to place the partnership assets under the protection of the Court, and to prevent everybody, except the officer of the Court, from in any way intermeddling with them.

(o) *Forrest v. Manchester, &c., Rail. Co.*, 30 Beav. 40, affirmed on appeal, 7 Jur. N. S. 887, but on a different ground.

(p) *Hare v. London and North Western Rail. Co.*, 2 J. & H. 80.

(q) *Simpson v. Westminster Palace Hotel Co.*, 2 De G. F. & J. 141, and 8 Ho. Lo. Ca. 712.

(r) *Taunton v. Royal Insur. Co.*, 2 Hem. & M. 135.

(s) *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411.

(t) *Taft v. Harrison*, 10 Ha. 489.

(u) *Hare v. London and North Western Rail. Co.*, 2 J. & H. 80.

(x) 7 Jur. N. S. 887.

(y) See further on this subject, *Orr v. Glasgow, &c., Rail. Co.*, 3 MacQu. 799; *Rogers v. Oxford, &c., Rail. Co.*, 2 De G. & J. 662.

Courts of equity are by no means anxious to take upon themselves the management of a partnership business, and they will, it is said, never do so, save with a view to a dissolution or final winding up of the affairs of the concern. In the well-known case of *Const v. Harris* (z), Lord Eldon intimated that a receiver might be appointed in a suit where a decree could be made for carrying on the concern according to some specific agreement between the parties, as well as in a suit for a dissolution and winding up; and in that very case a receiver was appointed, although no dissolution was prayed by the bill. The receiver here appointed was, however, in no sense a manager, but merely a person nominated to receive money coming in from certain quarters, and to apply it in the manner agreed upon in the partnership articles. If the appointment of a receiver does not involve the appointment of a manager, *Const v. Harris* is a clear authority to show that a receiver may be obtained in a suit not seeking a dissolution of the partnership; and later cases are not opposed to this. But the writer is not aware of any instance in which a suit has been instituted for the purpose of continuing a partnership, and in which the Court has appointed a receiver and manager; and in the late case of *Hall v. Hall* (a) Lord Cottenham decided that in such a suit no such appointment could be made. *Roberts v. Eberhardt* (b) is a still more recent case to the same effect. There the plaintiff and the defendants were partners in a colliery, the plaintiff being the managing partner. Disputes arose between the plaintiff and the defendant, and the former filed a bill for an account and a receiver, but did not ask for a dissolution. The Vice-Chancellor, on a motion by the plaintiff for a receiver, refused the motion on the ground that the object of the suit was to ensure a continuance of the partnership, and not to bring it to a close. As was said by Lord Eldon, the Court will not, by appointing receivers, take upon itself the management of every trade in the kingdom: nor will it take upon itself the management of *any* partnership business, save with a view to its final winding up (c).

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Receivers in
suits not seeking
a dissolution.

Const v. Harris.

Receiver and
manager.

Roberts v. Eberhardt.

(z) Turn. & R. 517.

(a) 3 Mac. & G. 79.

(b) Kay, 148.

(c) See *Goodman v. Whitcombe*,
1 Jac. & W. 589; *Harrison v. Ar-*
mitage, 4 Madd. 143; *Hall v. Hall*,

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Receiver not refused because no dissolution is prayed.

Sheppard v. Oxenford.

It is not, however, necessary, in order to induce the Court to interfere, that the plaintiff should by his bill expressly pray for a dissolution; for the Court will entertain an application for a receiver if the object of the suit is to wind up the partnership affairs, and the appointment of a receiver and manager is sought with that view. Thus, in *Sheppard v. Oxenford* (d), a bill was filed by the plaintiff on behalf of himself and other shareholders in the National Brazilian Mining Company against the defendant, its sole director and manager, praying for an account of monies received and paid by the directors on behalf of the association, and of its debts, and for payment thereof out of the assets of the company, and for a division of the profits amongst the shareholders. The bill also prayed for an injunction to restrain the defendant from selling the property, and for a receiver to get in the debts owing to the company, and all remittances made to it from abroad, and *generally to conduct the business and affairs of the association* until the accounts should be taken. No dissolution was expressly asked for, but the whole object of the suit evidently was to wind up the company, and have its assets applied in liquidation of its liabilities; and on a motion by the plaintiff for an injunction and a receiver, an injunction was granted, and a receiver and manager was appointed, as prayed by the bill (e).

Evans v. Coventry.

Again, in *Evans v. Coventry* (f), the members of two societies, or rather it would seem of one society, having two branches of business, viz., a loan branch, and an insurance branch, filed a bill for the purpose of having the funds

3 Mac. & G. 79; *Smith v. Jeyes*, 4 Beav. 503; *Waters v. Taylor*, 15 Ves. 10; *Oliver v. Hamilton*, 2 Anstr. 453. In *Morris v. Coleman*, 18 Ves. 438, there was a reference for the appointment of a manager.

(d) 1 K. & J. 491.

(e) A receiver and manager was appointed in this country, and the defendant, who had gone to the Brazils after the bill had been filed, was appointed receiver and manager out there.

(f) 5 De G. Mac. & G. 911, reversing S. C., 3 Drew. 75. It does not appear very distinctly what the manager, as distinguished from the receiver, was expected to do. The Vice-Chancellor refused the motion mainly upon the ground that he could not take upon himself the management of such societies, even until the hearing of the cause. The Court of Appeal did not allude to this.

of the societies made good by the defaulting directors, and of having the accounts investigated, the affairs of the societies wound up if necessary, and their assets in the meantime protected by the appointment of a manager and receiver. It was proved that some of the funds had already been made away with by the secretary; and a manager and receiver was appointed to protect what remained until the hearing of the cause, upon the ground that the plaintiffs had an interest in the funds in question, and that those funds were in danger of being lost.

It has been already remarked, that in granting or refusing an order for a receiver the Court does not act on the same principles as when it grants or refuses an order for an injunction; it being one thing to manage the affairs of a partnership oneself, and another to prevent a person who has already misconducted himself from interfering further with the partnership concerns (*g*). Another reason for drawing a distinction between an injunction and a receiver is, that whilst the former excludes only the person against whom it is granted, the latter excludes *all* the partners from taking part in the management of the concern. It, therefore, does not follow that because the Court will grant an injunction, it will also appoint a receiver, or that because it refuses to appoint a receiver, it will also decline to interfere by injunction (*h*).

Difference between granting an injunction and appointing a receiver.

The right to the appointment of a receiver in suits for a dissolution or winding up of a partnership, depends in the first place on whether the person sought to be excluded from interference is a partner or not. For whilst the Court is reluctant to exclude a partner from the management of the partnership affairs, it will readily interfere to prevent other persons from intermeddling therewith. The reason given for this is, that each partner is at the outset trusted by his co-partners, and has confidence reposed by them in him; and until it can be shown that he ought not to be allowed to take part any longer in the management of the partnership affairs, the Court will

Receivers readily appointed against non-partners.

(*g*) See *Hall v. Hall*, 3 Mac. & G. 85.

(*h*) Although an injunction was granted, a receiver was refused, in

Read v. Bowers, 4 Bro. C. C. 441; *Hartz v. Schrader*, 8 Ves. 317; *Hall v. Hall*, 12 Beav. 414, and 3 Mac. & G. 79.

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Fraser v. Kershaw.

Influence of the number of partners on the appointment of a receiver.

not interfere with him. But this reasoning has no application to persons who acquire an interest in the partnership assets by events over which the partners have no control, *e. g.*, the death or bankruptcy of one of the members of the firm. Whilst, therefore, even in a suit for a dissolution, or winding up, a receiver will not be granted against a member of the firm, unless some special ground for the interference of the Court can be established (*i*), it is a matter of course to appoint a receiver where all the partners are dead, and a suit is pending between their representatives (*k*); or where such appointment is sought by a partner against the representatives of his late co-partner (*l*). *Fraser v. Kershaw* (*m*) is a good illustration of this doctrine. There one partner had become bankrupt; the share of the other partner had been taken in execution under a *fi. fa.* for a separate debt, and had been assigned to his creditor by the sheriff. The creditor, as the assignee from the sheriff of all the share and interest of the non-bankrupt partner, claimed the right of winding up the affairs of the partnership, and to exclude the assignees of the bankrupt partner from interfering. But on a bill filed by them against the judgment creditor, the Court granted an injunction, and appointed a receiver, holding that the right of the non-bankrupt partner to wind up the affairs of the partnership was personal to himself, and was incapable of transfer, and did not, therefore, pass with his share and interest in the partnership assets (*n*).

Inasmuch as the Court will not appoint a receiver against a partner unless some special ground for so doing can be shown, it follows that in a firm of several members there is more difficulty in obtaining a receiver than in a firm of two.

(*i*) *Harding v. Glover*, 18 Ves. 281; *Collins v. Young*, 1 Macqueen, 385, and see *Kershaw v. Matthews*, 2 Russ. 62; *Kennedy v. Lee*, 3 Mer. 448; *Lawson v. Morgan*, 1 Price, 303. For similar reasons the Court of Probate will not appoint a receiver *pendente lite* against a surviving partner unless under very special circumstances, *Horrell v.*

Witts, L. R. 1 Pr. & Div. 103.

(*k*) *Phillips v. Atkinson*, 2 Bro. C. C. 272.

(*l*) *Freeland v. Stansfeld*, 2 Sm. & G. 479.

(*m*) 2 K. & J. 496.

(*n*) See, too, *Candler v. Candler*, Jac. 225, where a receiver was granted against the assignee of partnership debts.

For the appointment of a receiver, operating in fact as an injunction against *all* the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by an injunction than by a receiver (*o*). Bk. III. Chap. 10.
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The grounds on which the Court is usually asked to appoint a receiver, are either because, by agreement, the partners have divested themselves more or less of their right to wind up the affairs of the concern; or because, by misconduct, the right of personal intervention has been forfeited, and the partnership funds are in danger of being lost. Grounds for the
appointment of a
receiver against
a partner.

As an illustration of an appointment of a receiver, grounded on an express agreement, reference may be made to *Davis v. Amer* (*p*). There the plaintiff and the defendant, on dissolving partnership, appointed a stranger to get in the assets of the firm, and agreed not to interfere with him. After this agreement had been partially acted on, one of the partners died, and disputes arising between the executors of the deceased partner and the surviving partner, the latter proceeded to get in the debts of the firm, in violation of the agreement. On a bill filed by the executors of the deceased partner for an account, and for an injunction and a receiver, the Court, on motion, appointed a receiver, but declined to grant an express injunction, on the ground that there was no sufficient impropriety of conduct on the part of the defendant to render such an order necessary (*q*). Agreement.
Davis v. Amer.

With respect to misconduct, the observations which have been already made on this head, when speaking of injunctions, might be here repeated (*r*). There must be something more than a partnership squabble; the due winding up of the affairs of the concern must be endangered to induce the Court to appoint a receiver of its assets; and non-co-operation of one partner, whereby the whole responsi- Misconduct.

(*o*) See *Hall v. Hall*, 3 Mac. & G. 79.

(*p*) 3 Drew. 64. See, too, *Turner v. Major*, 3 Giff. 442, a somewhat similar case. No receiver, how-

ever, appears to have been appointed. An injunction was sufficient.

(*q*) See *ante*, p. 1003, note (*k*).

(*r*) *Ante*, p. 1007.

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Receiver appointed.

Effect of fraud
by a partner.

Effect of excluding
a partner.

bility of management is thrown on his co-partner, is not sufficient (s).

Where, however, a partner has so misconducted himself as to show that he is no longer to be trusted, as, for example, if one partner colludes with the debtors of the firm, and allows them to delay paying their debts (*t*); or carries on a separate trade with the partnership property (*u*); or, the partnership property being abroad, runs off in order to do what he likes with it there (*x*); or, if a surviving partner insists on carrying on the business, and employing therein the assets of his deceased partner (*y*); or if there is such mismanagement as endangers the whole concern (*z*); or if the persons having the control of the partnership assets have already made away with some of them (*a*); in all these cases the Court will interfere by appointing a receiver (*b*).

Again, the reluctance of the Court in appointing a receiver against a partner, being based on the confidence originally reposed in him, that reluctance disappears if it can be shown that such confidence was originally misplaced. Therefore, where a defendant, by false and fraudulent representations, induced the plaintiff to enter into partnership with him, and the plaintiff soon afterwards filed a bill, praying that the partnership might be declared void, and for a receiver, the Court on motion ordered that a receiver should be appointed (*c*).

Moreover, even although there be no misconduct jeopardising the partnership assets, the Court will appoint a receiver if the defendant wrongfully excludes his co-partner from the management of the partnership affairs (*d*). This doctrine is

(s) See *Roberts v Eberhardt*, Kay, 495.
148, and *Rowe v. Wood*, 2 J. & W.
556, where one partner declined
to advance more money to work a
mine.

(t) *Eastwick v. Coningsby*, 1
Vern. 118.

(u) *Harding v. Glover*, 18 Ves.
281.

(x) *Sheppard v. Oxenford*, 1 K.
& J. 491.

(y) *Madgwick v. Wimble*, 6 Beav.

(z) See *De Tastet v. Bordieu*,
cited in a note in 2 Bro. C. C. 272;
but see *Const v. Harris*, T. & R.
524.

(a) *Evans v. Coventry*, 5 De G.
Mac. & G. 911.

(b) See *Smith v. Jeyes*, 4 Beav.
503.

(c) See *Ex parte Broome*, 1 Rose,
69.

(d) See *Wilson v. Greenwood*, 1

acted on where the defendant contends that the plaintiff is not a partner (*e*), or that he has no interest in the partnership assets (*f*). Bk. III. Chap. 10.
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Where a partnership is alleged on the one side and denied on the other, and a motion is made for a receiver, the Court, if it directs an issue as to partnership or no partnership, usually declines to appoint a receiver until that question is determined (g).

Disputed partnership.

Some difficulty occurs where the defendant relies on illegality as a defence to the suit against him. If the illegality is established, the Court cannot, it is conceived, interfere. But if a receiver is moved for before the hearing of the cause, and the Court is not perfectly satisfied that no relief can ultimately be given, it will appoint a receiver to protect the property *pendente lite*, and the character of the defence will go far to remove any scruples the Court might otherwise have in interfering. Thus, in *Hale v. Hale* (*h*), the plaintiff and the defendant had carried on the business of brewers for many years in partnership together. The plaintiff filed a bill for a dissolution, and the defendant then denied the plaintiff's right to any account or relief whatever, on the ground that the partnership was illegal. Having thus set the plaintiff at defiance, and claimed the whole property himself, Lord Langdale, on that ground alone, appointed a receiver and manager, although the plaintiff was only a dormant partner, and the defendant's management of the business was in no way complained of.

Illegality of
partnership.

Hale v. Hale.

In mining partnerships a receiver will be appointed or refused upon the same principles as in other partnerships.

Receivers of
mines.

Swanst. 481; and *Goodman* v. *Whitcomb*, 1 J. & W. 589.

(e) *Peacock* v. *Peacock*, 16 Ves.
49; *Blakeney* v. *Dufaur*, 15 Beav.
40.

(f) *Wilson v. Greenwood*, 1 Swanst. 471, where the plaintiffs were the assignees of a bankrupt partner. See, too, *Clegg v. Fishwick*, 1 Mac. & G. 294, where the plaintiff was the administratrix of a deceased partner.

(g) *Peacock* v. *Peacock*, 16 Ves.

49; *Chapman v. Beach*, 1 J. & W. 594; *Fairburn v. Pearson*, 2 Mac. & G. 144. See *Rock v. Mathews*, 2 De G. & Sm. 227, as to the conclusiveness, upon a motion for a receiver, of an answer denying the partnership alleged by the bill.

(h) 4 Beav. 369. See, too, *Shepard v. Oxenford*, 1 K. & J. 491, where a receiver was appointed although the legality of the partnership was denied.

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Rowe v. Wood.

Accordingly, if no dissolution or winding up is sought, a receiver and manager will not be appointed (*i*); but with a view to a dissolution or winding up, a receiver and manager will be appointed, if there are any such grounds for the appointment as are sufficient in other cases (*k*); or if the partners cannot agree as to the proper mode of working the mines until they are sold (*l*). In *Rowe v. Wood* (*m*), indeed, a receiver was refused, although one of the partners excluded the other from interfering with the mine; but this was a peculiar case, for the partner complained of was not only a partner, but also a mortgagee in possession, and his mortgage debt was still unsatisfied. Again, in *Norway v. Rowe* (*n*), although the plaintiff was excluded, a receiver was refused on the ground of his laches, he having been excluded for some time, and having taken no steps to assert his rights until the mine proved profitable (*o*).

Lunacy.

In *Rowlands v. Evans*, and *Williams v. Rowlands* (*p*), it was held that a manager could not be appointed to carry on a mine for the benefit of a lunatic partner. The Court ordered a sale and appointed an interim manager only.

Appointment of
partner to be
receiver.

If the Court, on being applied to for the appointment of a receiver, thinks that a proper case for such appointment is made, and the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the Court generally appoints him receiver and manager without salary (*q*). It is usual, however, to require him to give security duly to manage the partnership affairs, and to account for money received by him (*q*). In other cases the appointment of a receiver is referred by the judge to

(*i*) *Roberts v. Eberhardt*, Kay, 148; and see *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302, noticed below.

(*k*) *Sheppard v. Oxenford*, 1 K. & J. 491, where there was no prayer for a dissolution.

(*l*) *Jefferys v. Smith*, 1 J. & W. 298; *Lees v. Jones*, 3 Jur. N. S. 954, V.-C. W. In this last case will be found a discussion as to what ought to be done if the mine

is held on a lease, and cannot be sold without the lessor's consent, which is refused.

(*m*) 2 J. & W. 553.

(*n*) 19 Ves. 159.

(*o*) See further on this matter, *ante*, p. 900, *et seq.*

(*p*) 30 Beav. 302.

(*q*) This was done in *Wilson v. Greenwood*, 1 Swanst. 471; *Blake-ney v. Dufaur*, 15 Beav. 40.

his chief clerk, and leave is frequently given for each partner to propose himself. A partner who is appointed receiver becomes the officer of the Court, and must act and be respected accordingly.

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Sect. 3.

The order appointing a receiver usually directs the partners to deliver up to him all the effects of the partnership, and all securities in their hands, for the outstanding personal estate, together with all books and papers relating thereto. The receiver is directed to get in the debts of the firm, and he is, if necessary, empowered to bring actions with the approbation of the judge; he is directed to pay the partnership debts, and to pass his accounts, and to pay balances in his hands into court (r).

Order appoint-
ing receiver.

With respect to the partnership books and papers, an order for their delivery will not be made if there is no necessity for it, and if it would occasion inconvenience. For example, in *Dacie v. John* (s), the Court declined to order a solicitor, who was the managing partner of a firm, to deliver up its books and documents to the receiver: for the receiver had free access to them all, and nothing more was considered necessary.

A receiver is an officer of the Court, and any interference with him, or with property under his protection, amounts to a contempt of Court, and is punishable accordingly (t).

Interfering with
receiver.

5. *Of the sale of partnership property under the decree of the Court.*

It has been already seen, that in the absence of a special agreement to the contrary, the right of each partner on a

Conversion of
partnership
property.

(r) See forms of order in 2 Seton on Decrees, 1002, ed. 3; *Wilson v. Greenwood*, 1 Swanst. 484; *Whitley v. Lowe*, 4 Jur. N. S. 815. The receiver here was appointed without opposition, see 4 Jur. N. S. 197, S. C.

(s) McClel. 206.

(t) See *Lane v. Sterne*, 3 Giff. 629, where a sheriff seized partnership property in the custody of a

receiver. When an order for a receiver is made, a person is sometimes immediately put into possession; but until he is actually approved as receiver by the Court, strangers to the suit in which he is appointed are not guilty of contempt of Court if they interfere with him. See *Defries v. Creed*, 6 New. Rep. 17, V.-C. K.

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Sect. 3.

Agreements to
avoid sale which
cannot be car-
ried out.

Agreement for
equal division.
*Cook v. Col-
lingridge.*

Agreement to
take at valua-
tion.

*Wilson v. Green-
wood.*

dissolution, is to have the partnership property converted into money by a *sale* (*u*): even although a sale may not be necessary for the payment of debts (*x*). This mode of ascertaining the value of the partnership effects is adopted by courts of equity, unless some other course can be followed consistently with the agreement between the partners. And even where the partners have provided that their shares shall be ascertained in some other way, still, if owing to any circumstance their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen, realisation of the property by a sale is the only alternative which a court of equity can adopt.

Thus in *Cook v. Collingridge* (*y*), where the partners had agreed that on the expiration of the partnership the stock in trade should be divided between the partners, it was held that as this could not be literally carried into effect, there must be a sale and a division of the proceeds.

So, if on the death of a partner an option is given to a third party, *e. g.*, his son or executor, to take his share at a valuation, and this is not done, a sale will be decreed (*z*). Again, in a case where the articles had provided that on a dissolution by the death of a partner his share should be taken by the survivors at a valuation, and they had afterwards agreed that in the event of a dissolution by bankruptcy, the same course should be followed as in the event of a dissolution by death, it was held that this last agreement not being under the circumstances binding on the assignees, the partnership property and effects ought to be sold (*a*).

On the other hand, if the articles of partnership can be

(*u*) *Burdon v. Barkus*, 3 Giff. 412, and on appeal, 8 Jur. N. S. 656, where a purchase by one partner at a valuation was insisted on; *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302, a case of lunacy. See, also, *Crawshay v. Collins*, 15 Ves. 227; *Crawshay v. Maule*, 1 Swanst 495; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Hale v. Hale*, 4 Beav. 375.

(*x*) See *Wild v. Milne*, 26 Beav. 504.

(*y*) Jac. 607, and see *Rigden v. Pierce*, 6 Madd. 353.

(*z*) See *Downs v. Collins*, 9 Ha. 418; *Kershaw v. Matthews*, 2 Russ. 62; and *Madgwick v. Wimble*, 6 Beav. 495.

(*a*) *Wilson v. Greenwood*, 1 Swanst. 471.

carried out in their spirit, and if a sale is inconsistent with them, then the rule in question will not apply, as for example in those cases already noticed (*b*), in which it has been agreed that a deceased partner's share shall be ascertained from the last signed account, and the partnership accounts have not been taken and signed as it was agreed they should.

Bk.III. Chap.10.
Sect. 3.

No sale where there is an agreement to the contrary which can be acted on.

The rule as to selling partnership property is merely adopted in order that justice may be done to all parties when no other course has been or can be agreed upon. It is not an arbitrary rule, inflexibly applied in all cases whether it is necessary or not; and although, if one partner or his representatives insist on a sale, the Court may not be able to refuse to enforce that right (*c*), still the Court is always inclined to accede to any other mode of settlement which may be fair and just between the partners. In a late case, where one partner had become lunatic, and a decree for a dissolution had been obtained on that ground, and an offer was made by the other partners to pay a sum of money as the lunatic's share, the Court referred it to the Master to inquire whether it would be for the benefit of the lunatic that such offer should be accepted; and on the Master reporting in the affirmative, the Court ordered that the offer should be accepted, thereby dispensing with a sale and winding up in the ordinary way (*d*). So if one partner is an infant, and it appears that it will be for his benefit that the whole property shall be sold to one or more of the partners who are desirous of buying it, and the other partners consent, the Court will sanction a sale accordingly (*e*). But although it may be for the benefit of an infant or lunatic partner that his share should be sold, yet if the other partners insist on the sale of the whole property they are entitled to such a sale (*f*).

Sale not decreed although one partner was lunatic.

Co-owners of land, whether mineral or not, are entitled to a partition and not a sale; and even although they may be partners in the profits arising from the land, still if the land itself

Mining partnership.

(*b*) See *Pettyt v. Janeson*, 6 Madd. 146; *Simmons v. Leonard*, 3 Ha. 581, *ante*, pp. 832, *et seq.*

(*c*) *Wild v. Milne*, 26 Beav. 504, and *Rowlands v. Evans*, 30 Beav. 302.

(*d*) *Leaf v. Coles*, 1 De G. Mac.

& G. 171. See, too, *Prentice v. Prentice*, 10 Ha. App. 22.

(*e*) *Crawshay v. Maule*, 1 Swanst. 530.

(*f*) *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302.

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Mode of selling.

Conduct of sale
and leave to bid.

Sale of good-
will.

is not partnership property, one co-owner is not entitled to have it sold against the wishes of the others (*g*). But if land or a mine is partnership property, the right of each partner is to have it sold; and a partition can only be decreed by consent (*h*).

The sale to which each partner has a right is a sale to the highest bidder (*i*). But with a view to do as little injustice as possible, when the Court decrees a sale it will, if necessary, direct an inquiry as to the proper mode of selling (*k*), and whether it will be for the benefit of all parties that there should be an immediate sale, or that the concern should be carried on for the purpose only of winding up its affairs: and if the latter is the case, the Court will give any of the parties liberty to propose himself as manager until a sale (*l*). In a recent case (*m*), partnership property was ordered to be sold, as a going concern, by a disinterested person, with liberty to all parties to bid; and an interim receiver and manager was appointed.

The Court is extremely reluctant to give parties who have the conduct of a sale liberty to bid at it; and the conduct of a sale in a suit usually belongs to the plaintiff; if, therefore, he desires to bid, some arrangement has generally to be made respecting the conduct of the sale. Other parties interested have seldom any difficulty in obtaining liberty to bid (*n*).

In selling the good-will of a going concern, the book debts and business ought to be sold in one lot, and the purchaser ought to be informed, if the fact be so, that the sellers are entitled to carry on business in competition with him (*o*).

(*g*) See *ante*, pp. 66, 67.

(*h*) *Wild v. Milne*, 26 Beav. 504; and see *Burdon v. Barkus*, 8 Jur. N. S. 656, and *Rowlands v. Evans*, 30 Beav. 302. As to mines not saleable without the consent of the landlord, see *Lees v. Jones*, 3 Jur. N. S. 954.

(*i*) No partner has a right to buy or to compel his co-partners to buy at a valuation unless there is some agreement to that effect, *Burdon v. Barkus*, 8 Jur. N. S. 656, and other cases cited, *ante*, 1024, note (*u*).

(*k*) As in *Wilson v. Greenwood*, 1 Swanst. 484; *Cook v. Collingridge*, Jac. 624.

(*l*) *Crawshay v. Maule*, 1 Swanst. 529; *Waters v. Taylor*, 2 V. & B. 306. See, too, *Wild v. Milne*, 26 Beav. 504.

(*m*) *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302.

(*n*) See on this subject, 2 Seton on Decrees, 1184, ed. 3.

(*o*) See *Johnson v. Helleley*, 34 Beav. 63, and 10 Jur. N. S. 1041.

If one of the partners holds an appointment which is not saleable, but the profits of which are by agreement to be accounted for by him to the partnership, the partner holding the appointment will be debited with its value; for that is the only mode in which, upon a dissolution, such a source of gain can be dealt with (p).

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Sect. 3.

Unsaleable appointments.

Although it is not usual for the Court to direct a sale before the hearing of the cause, still, if circumstances require it, an order for a sale will be made on motion, even although the partnership has not been previously dissolved (q).

Sale before the hearing of the cause.

(p) See *Smith v. Mules*, 9 Ha. 572.

(q) *Bailey v. Ford*, 13 Sim. 495; *Crawshay v. Maule*, 1 Swanst. 523.

BOOK IV.

ON THE WINDING-UP OF PARTNERSHIPS AND COMPANIES.

GENERAL OBSERVATIONS.

Book IV.

THE duration of a contract of partnership, the events which give rise to a dissolution of such contract, and those other events which, without dissolving the contract, confer a right to have it dissolved, were all considered in the eighth chapter of the first book.

Winding up of
partnerships.

In order to wind up the affairs of a dissolved partnership, it is necessary first to pay its debts ; secondly, to settle all questions of account between the partners ; and, thirdly, to divide the unexhausted assets (if any) between the partners in proper proportions ; or, if the assets are insufficient to pay the debts, then to make up the deficiency by a proper contribution between the partners. This can be done by the partners themselves, or their representatives (*a*) ; but if disputes arise, then recourse must almost always be had to the Court of Chancery, for it is under its superintendence only that the assets of a partnership can be properly sold and applied, that the partnership accounts can be satisfactorily taken, and that contribution can be enforced.

A suit for the dissolution of a partnership dissolvable by the Court of Chancery, by virtue of its general jurisdiction, is sustainable, although the partnership is one which can be wound up under the statutory jurisdiction conferred by the Companies act, 1862 (*b*) ; but to such a suit all the partners must, it

(*a*) See *Lyon v. Haynes*, 5 Man. & Gr. 505, where a banking company governed by 7 Geo. 4, c. 46, had been voluntarily dissolved.

(*b*) See *Jones v. Charlemont*, 16 Sim. 271 ; *Clements v. Bowes*, 17 ib. 167.

seems, be parties (*c*); and therefore where the number of partners is great, recourse to that act is practically imperative. A suit for a dissolution is as proper in the case of a partnership at will, as in the case of a partnership for a specified period (*d*).

The consequences of a dissolution of partnership, both as regards creditors and as regards the partners themselves, have been pointed out in earlier parts of the treatise, and only require to be shortly recapitulated.

Consequences of dissolution.

I. *As regards the creditors of the firm*, it has been seen—

1. As regards creditors.

1. That a dissolution of partnership, whether general or partial, does not discharge any of the partners from liabilities incurred by them previously to the time of dissolution (*e*);

2. That in order that a member of a firm, wholly or partially dissolved, may be freed from his liability to a person who was a creditor of the firm at the time of its dissolution, such creditor must either have been paid, or satisfied, or must have accepted some fresh obligation in lieu of that which existed when the firm was dissolved (*f*);

3. That (except in a few special cases) (*g*) notice of dissolution or retirement is requisite to determine the responsibility of each partner in respect of such future acts of his late co-partners, as would be imputable to the firm if no change in it had taken place (*h*);

4. That notice of dissolution generally, as by advertisement, is not sufficient to affect an old customer, unless it can be brought to his knowledge (*i*);

5. That notice of dissolution, is notice that the former partners are no longer each other's agents as before (*k*);

6. That after dissolution and notice, partners cease to be responsible for the future acts of each other (*l*), unless they continue to hold themselves out as partners, in which case the notice is of no avail (*m*).

II. *As regards the partners themselves*. Upon the dissolution

2. As regards the partners.

(*c*) See *ante*, p. 913.

(*d*) *Master v. Kirton*, 3 Ves 74.

(*e*) *Ante*, pp. 421, *et seq.*

(*f*) *Ibid.*

(*g*) *Ante*, pp. 408, *et seq.*

(*h*) *Ibid.*

(*i*) *Ante*, p. 419.

(*k*) *Ante*, p. 412.

(*l*) *Ibid.*

(*m*) *Ante*, p. 414.

Book IV.

As regards the
partners.

of a partnership, and in the absence of any agreement to the contrary, it has been seen—

1. That each partner has a right to have the partnership assets applied in liquidation of the partnership debts, and to have the surplus assets divided (*n*);

2. That the right of each partner is to insist on a sale of the partnership assets; there being, in the absence of express stipulation to that effect, no right in any partner to have the value of his own or of any co-partner's share determined by valuation, or to have the partnership property, or any portion of it, divided in specie (*o*);

3. That each partner has a right to insist that nothing further shall be done, save with a view to wind up the concern (*p*);

4. That, for the purposes of winding up, the partnership is deemed to continue (*q*); the good faith and honourable conduct due from every partner to his co-partners during the continuance of the partnership, being equally due so long as its affairs remain unsettled (*r*); and that which was partnership property before, continuing to be so for the purpose of dissolution, as the rights of the partners require (*s*);

5. That the right on a dissolution to wind up the partnership affairs, *i.e.*, to get in its credits, convert its assets into money, pay its debts, and divide the residue, belongs as much to one of the late partners as to another; and if they cannot agree amongst themselves, recourse must be had to the Court of Chancery, which will, if necessary, appoint a receiver, direct a sale and payment of the partnership debts, and restrain a partner from ejecting his co-partner from land belonging to the partnership, but the legal estate of which may be in him alone (*t*);

(*n*) *Ex parte Ruffin*, 6 Ves. 127.

(*o*) *Ante*, p. 1024.

(*p*) *Wilson v. Greenwood*, 1 Swanst. 481; *Crawshay v. Maule*, *ib.* 507; *Ex parte Williams*, 11 Ves. 3.

(*q*) See *ante*, p. 415.

(*r*) *Ante*, p. 583.

(*s*) See *Ex parte Williams*, 11 Ves. 5 & 6; *Crawshay v. Collins*,

2 Russ. 342, 343; *Nerot v. Burnand*, 4 Russ. 247; *Payne v. Hornby*, 25 Beav. 280. See, too, *Ex parte Trueman*, 1 D. & Ch. 464, as to partnership books.

(*t*) *Elliot v. Brown*, 3 Swanst. 489, *n.*; *Hawkins v. Hawkins*, 4 Jur. N. S. 1044. See, as to the right at law to bring trespass, *Benham v.*

6. That the right to wind up the affairs of a dissolved partnership is, however, personal to the members of the late firm; and that, therefore, on the death or bankruptcy of one of them, his executors or assignees will not be permitted to take the management of the affairs of the partnership out of the hands of the other partners (*u*);

7. That if the partnership assets are insufficient to pay the partnership debts, the deficiency must be made good by the partners in proportion to their respective shares (*w*);

8. That after a partnership has been dissolved, any one of the late partners has a right to have that dissolution duly notified, so that a stop may be put to the power of his co-partners to bind him (*x*). It seems that he has also a right to restrain them from carrying on business under the old name, if such name is or includes his own; for although their continued use of the old name, even with his knowledge, is not sufficient to render him liable, by virtue of the doctrine of holding out (*y*), such use undoubtedly exposes him to the risk of having actions brought against him as if he still belonged to the firm, and his co-partners have no right to expose him to that risk (*z*);

9. That each partner has a right to commence a new business in the old line, and in the old neighbourhood; either alone, or in partnership with other people (*a*).

Such, in general terms, are the consequences of dissolution. In order, however, to obtain a complete view of these consequences, it is necessary to attend to the principles upon which partnership accounts are taken; to the distinction between the joint estate of the firm, and the separate estates of the partners composing it; to the doctrines of contribution and indemnity; to the rules which govern courts of equity in appointing a receiver and granting an injunction; and lastly, to the special agreements, if any, into which the partners may

Matters involved
in the winding
up of a partner-
ship.

Gray, 5 C. B. 138; and to eject,
Doe v. Miles, 4 Camp. 373; *Doe v.*
Bluck, 8 C. & P. 464.

(*u*) *Allen v. Kilbre*, 4 Madd. 464;
Ex parte Finch, 1 D. & Ch. 274;
Fraser v. Kershaw, 2 K. & J. 496.

(*w*) See *ante*, p. 789.

(*x*) *Troughton v. Hunter*, 18 Beav.
470.

(*y*) *Newsome v. Coles*, 2 Camp. 617.

(*z*) See *ante*, p. 1008.

(*a*) See, as to this, *ante*, p. 838.

Book IV.

have entered. All these matters were discussed in the third book, and it is not necessary further to allude to them. But the complicated questions which arise in the event of a dissolution by death or bankruptcy, have necessarily been reserved for separate examination, and they will form the subject of the first two chapters of the present book.

Winding up of
companies.

The causes and consequences of the dissolution of companies, and the mode of winding up their affairs, have also been reserved for consideration in the present book. The law upon this subject may be properly said to have been developed by legislative enactment from general principles of the law of partnership; and although it is true that many of the principles which govern the dissolution and winding up of partnerships have no application to the dissolution and winding up of companies, still it will be found that others of those principles have carefully been preserved, and form the basis on which the statutory law of winding up may truly be said to rest. Pursuing, therefore, with respect to the present branch of the law, the same method which has been observed with respect to those branches which have already been disposed of, it is proposed first to examine the consequences of death and bankruptcy, both as regards partners and as regards shareholders; and then to pass to the modern statutory enactments relating to the dissolution and winding up of companies, under what are commonly called the Winding-up acts.

Subject of pre-
sent book.

CHAPTER I.

OF DEATH AND ITS CONSEQUENCES.

THE consequences of the death of a member of a partnership or company will be most conveniently pointed out in the course of an examination of the position of the surviving members, and of the executors of the deceased member— Bk. IV. Chap. 1.

1. As between themselves ;
2. As regards the creditors of the firm ; and
3. As regards the separate creditors and legatees of the deceased.

SECTION I.—CONSEQUENCES AS REGARDS THE SURVIVING PARTNERS AND THE EXECUTORS OF THE DECEASED.

2. *In the case of ordinary partnerships.*

The death of any one member of a firm operates as a dissolution thereof as between all the members, unless there is some agreement to the contrary (*a*) ; and the mere fact that the partnership was entered into for a definite term of years, which was unexpired when the death occurred, is not sufficient to prevent a dissolution by such death (*b*).

Death of a partner dissolves the firm.

Unless all the partners have agreed to the contrary, when one of them dies, his executors have no right to become partners with the surviving partners (*c*) ; nor to interfere with the partnership business ; but the executors of the deceased represent him for all purposes of account, and, unless re-

Executors of deceased do not become partners.

(*a*) See *ante*, p. 236.

(*c*) *Pearce v. Chamberlain*, 2 Ves.

(*b*) *Crawford v. Hamilton*, 3 Madd. S. 33.

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Sect. 1.

strained by special agreement, they have the power, by instituting a suit in chancery, to have the affairs of the partnership wound up in a manner which is generally ruinous to the other partners.

Jus accrescendi,
&c.

The maxim *jus accrescendi inter mercatores locum non habet*, has been already examined, and need not be again noticed (*d*). But it may be as well to remind the reader, that the doctrine of non-survivorship has no application to the legal estate in land, nor to the right to sue at law for a debt due to the partnership, nor to the liability to be sued at law for a debt due by it (*e*). Moreover, if two persons agree to become partners, and one of them obtains a lease of land or any other property for the purposes of the partnership, but the other person declines to carry out the agreement and to become a partner, and dies, his executors have no right against the survivor in respect of the property in question (*f*).

Position of surviving partners.

On the death of a partner the surviving members of the firm become at law solely entitled to sue, and solely liable to be sued in respect of debts owing to or by the firm (*e*); and they are consequently the proper persons to get in and pay such debts (*g*). But the debts they get in must be placed to the debit of the late firm, and the debts they pay must be placed to its credit. Whilst, therefore, the executors of the deceased partner are entitled to have payments made to the survivors by a debtor to the old firm, applied in payment of his debt (*h*), the survivors have a right, if they pay more than their share of the debts of the old firm, to be reimbursed out of the estate of their deceased co-partner (*i*). They are creditors against that estate for what may be due to them, from their deceased partner, on taking the partnership accounts, and they may as creditors institute a suit for the administration of his estate (*k*).

(*d*) *Ante*, p. 664.

(*e*) *Ante*, p. 492.

(*f*) *Reilly v. Walsh*, 11 Ir. Eq. Rep. 22.

(*g*) *Ante*, 492.

(*h*) *Lees v. Laforest*, 14 Beav. 250.

(*i*) *Musson v. May*, 3 V. & B. 194.

(*k*) See *Robinson v. Alexander*, 2 Cl. & Fin. 717; *Addis v. Knight*, 2 Mer. 119. If the deceased has pledged his real estate to his co-partners for a debt due from him to them, they cannot enforce their security in the absence of his legal personal representative, *Scholefield v. Heafield*, 7 Sim. 667.

If he has no legal personal representative, the Court of Probate will grant a limited administration to a nominee of the surviving partners, so as to enable them to institute proceedings to have the partnership accounts properly taken (*l*).

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A surviving partner, if a creditor of the deceased, may sue either in that character for a common administration decree, or, in the character of a partner, for a decree for a partnership account, and for payment of what is due on that account; and if assets are not admitted, then for a decree for the administration of the estate of the deceased. A suit in the alternative may be sustained, if the plaintiff states facts which are not inconsistent, and which do not leave his true character uncertain; but a suit in the alternative will fail if the plaintiff relies on two inconsistent states of facts, leaving it doubtful which is the true one. In any case the legal personal representative of the deceased must be a party if an account of his estate is prayed. If there is no such representative, but the assets of the deceased or of the partnership are in danger, and the object of the plaintiff is to have them protected, he should confine his prayer for relief accordingly, and not seek for an account (*m*).

Suits by surviving partners against the executors of a deceased partner.

In the absence of an express agreement to that effect, the surviving partners have no right to take the share of the deceased partner at a valuation; nor to have it ascertained in any other manner than by a conversion of the partnership assets into money by a sale (*n*); nor have they any right of pre-emption (*o*). Even the good-will of the business, if saleable, must be sold for the benefit of the estate of the deceased; although the surviving partners are under no obligation to retire from business themselves, and cannot, it seems, be prevented from recommencing business together in the name of the old firm unless the good-will has been sold (*p*).

No right to take the share of deceased at a valuation.

In ascertaining the share of the deceased, the surviving partners must not only bring into account the assets of the

Accounting for subsequent profits.

(*l*) *Cawthorn v. Chalie*, 2 Sim. & Stu. 127. 226, 229; *Featherstonhaugh v. Fenwick*, 17 Ves. 308.

(*m*) *Rawlings v. Lambert*, 1 J. & H. 458. (*o*) *Brown v. Gellatly*, 31 Beav. 243.

(*n*) *Crawshay v. Collins*, 15 Ves. (*p*) See *ante*, p. 844.

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Sect. 1.

Allowance for
carrying on
business.

Position of the
executors of the
deceased.

firm which actually existed at the time of his death, but also, whatever has been obtained by the employment of those assets up to the time of the closing of the account; for so long as profits are made by the employment of the capital of the deceased partner, so long must such profits be accounted for by the surviving partners (*q*). The executors of the deceased have, however, the option of taking interest at 5*l.* per cent. (*r*).

On the other hand, the surviving partners are entitled, if they carry on the business for the benefit of the estate of the deceased partner, to an allowance for so doing; unless they are also his executors, in which case they can make no charge for their trouble (*s*).

The right of the executors as against the surviving partners is, simply, to have the share of the deceased ascertained and paid; but this frequently cannot be done without a general sale and winding up of the partnership.

A *bonâ fide* sale, however, by the executors to the surviving partners can generally be made with safety if no surviving partner is an executor (*t*). Where, however, a sale of the share of the deceased cannot be effected by private arrangement, the executors must enforce a general sale and winding up for their own safety, unless the persons interested in the estate of the deceased assent to the adoption of some other course. And even if they do, it must not be forgotten that the executors cannot, without risk to themselves, continue the share of the deceased in the business, and take the profits accruing in respect of it; for by sharing profits made after the death of the deceased, the executors, although they are only trustees for others, will become *quasi*-partners with the surviving partners; and will become therefore liable to be made bankrupt and to be compelled personally to pay debts contracted in carrying on the business (*u*). The position of the executors of a deceased partner is, in fact, often one of considerable hardship and difficulty; if they insist on an immediate winding up of the firm they may ruin those whom the deceased may have been most

(*q*) See *ante*, pp. 989, *et seq.*

(*r*) *Ante*, p. 992.

(*s*) *Ibid.*

(*t*) See *infra*, § 3.

(*u*) *Ex parte Holdsworth*, 1 M. D. & D. 475; *Wightman v. Townroe*, 1 M. & S. 412; *Ex parte Garland*, 10 Ves. 119.

anxious to benefit; whilst if for their advantage the partnership is allowed to go on, the executors run the risk of being ruined themselves. With a view to obviate this, it is not unusual for one partner to make his co-partner his executor; but the difficulty of the executor's position is thus rather increased than diminished; for his own personal interest as a surviving partner is brought into direct conflict with his duty as an executor. Everything therefore which he does is liable to question and misconstruction on the part of the persons beneficially entitled to the estate of the deceased; and he is practically much more fettered in the discharge of his duties, and in the exercise of his rights, than if he had not to act in the double character imposed upon him (*x*). This will appear in the section in which it is proposed to examine the rights of the separate creditors and legatees of the deceased against his executors and his surviving partners.

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Sect. 1.

Effect of making
a co-partner an
executor.

Where a deceased partner's estate is administered under the decree of the Court of Chancery, his executors, if they act properly, are personally protected from all consequences; and creditors of the deceased will not be allowed to sue them at law (*y*). If there are liabilities which will have to be met, the court will order part of the assets to be set aside to meet them when they arise (*z*). But if the liabilities are remote and contingent, and may possibly never arise at all, the utmost that the executors can obtain in the shape of indemnity, in addition to that afforded by the Court itself, is a covenant from the testator's legatees or next of kin (*a*).

Suits for in-
demnifying
executors.

No succession duty is payable by surviving partners on the death of a member of the firm, even although they may benefit thereby (*b*).

Succession duty.

(*x*) See some general remarks on this subject in *Hutton v. Rossiter*, 7 De G. Mac. & G. 12.

(*y*) *Waller v. Barrett*, 24 Beav. 413.

(*z*) *Fletcher v. Stevenson*, 3 Ha. 360; *Brewer v. Pocock*, 23 Beav.

310.

(*a*) See *Dean v. Allen*, 20 Beav. 1; *Waller v. Barrett*, 24 ib. 413; *Addams v. Ferick*, 26 Beav. 384; *Bennett v. Lytton*, 2 J. & H. 155.

(*b*) *Oldfield v. Preston*, 3 De G. F. & J. 398.

2. *In the case of companies.*Bk. IV. Chap. 1.
Sect. 1.Executors of
shareholders.

The position of the executors of a deceased shareholder relatively to the company will, after the foregoing observations, be readily understood.

1. The executors are entitled to be paid by the company whatever is payable by it in respect of the shares of the deceased at the time of his death; and also whatever becomes payable in respect of those shares whilst they form part of his estate.

Liability to
calls, &c.

2. The assets of the deceased are liable to make good whatever is at the time of his decease payable by him to the company; and also whatever afterwards becomes payable by his representatives by virtue of the contract into which he entered. Consequently, if a person becomes a shareholder in a company and then dies, and afterwards, and whilst his shares are part of his estate, a call is made by the company on its shareholders, his assets will be liable to the payment of such call, not only in equity (*c*), but also at law (*d*). Moreover a call, made by a company in pursuance of its act, charter, or deed of settlement, constitutes a specialty debt (*e*), and is therefore, if made before the simple contract debts of the deceased are paid, entitled to priority over them. At the same time, executors who pay the simple contract debts of their testator before a call is made, will be allowed those payments as against the company seeking to make them liable for a *devastavit*; for notwithstanding the liability of the testator's estate to pay calls if made, that contingent liability is not enough to render improper the application of the assets in payment of debts actually due (*f*). Consequently, no part of the testator's assets ought, as against his simple contract creditors, to be set apart for the payment of calls which have not been made (*g*).

(*c*) See *Fyler v. Fyler*, 2 Ra. Ca. 813; *Blakesley's case*, 13 Beav. 133, and 3 Mac. & G. 726; *Heward v. Wheatley*, 3 De G. Mac. & G. 628.

(*d*) *Wills v. Murray*, 4 Ex. 843. Compare *Weald of Kent Canal Co. v. Robinson*, 5 Taunt. 801.

(*e*) *Cork and Bandon Rail. Co. v.*

Goode, 13 C. B. 826; and see, as to companies governed by the Companies' act, 1862, § 16 of that act. Compare *Robinson's Executors' case*, 6 De G. Mac. & G. 572.

(*f*) *Henderson v. Gilchrist*, 17 Jur. 570, V.-C. K.

(*g*) *Wentworth v. Chevell*, 3 Jur.

3. It follows from the foregoing observations that when a company is being wound up, the executors of a deceased shareholder are liable to be made contributories as executors in respect of his shares so long as they remain untransferred (*h*). From this again it follows, that the executors of a deceased shareholder are entitled to petition for an order to wind up the company, although they may not be themselves shareholders therein (*i*). This subject will be further alluded to hereafter.

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Sect. 1.

Liability to be
made contribu-
tories.

4. In most companies, executors have, as between themselves and the company in which their testator was a shareholder, a right to become shareholders in his stead. But if an executor does become a shareholder, his liability, as well to the company as to its creditors, is a personal liability; and such liability is in no way qualified or limited by the circumstance that as between himself and those who are beneficially entitled to the testator's assets, the executor is not the owner of the shares standing in his name (*k*). Executors, therefore, should not become shareholders if they can avoid doing so; and it will be frequently found that they can transfer their testator's shares without first becoming shareholders themselves. Whether, however, this can or cannot be done, and the manner in which it is to be done, depend, in each case, upon the constitution of the company in which the shares are held. By the Companies act, 1862, provision is expressly made for transfers by executors, although they may not themselves be members (*l*). The transfer by executors of shares in companies, governed by the Companies clauses consolidation act, is also specially provided for (*m*); but by this act the executors must apparently be themselves registered as shareholders before they can transfer (*n*).

Necessity for
executors to be-
come share-
holders.

N. S. 805. As to the legatees and next of kin, see *supra*.

557; *Armstrong v. Burnet*, 20 Beav. 424.

(*h*) *Blakesley's case*, 13 Beav. 133, and 3 Mac. & G. 726; *Keene's Executors' case*, 3 De G. Mac. & G. 272.

(*l*) 25 & 26 Vict. c. 89, § 24, and see Table A., Nos. 12—16. The Table B. to the Companies' act, 1856, contained similar provisions.

(*i*) *Re Norwich Yarn Co.*, 12 Beav. 366.

(*m*) 8 & 9 Vict. c. 16, §§ 18, 19, 20.

(*k*) See *Spence's case*, 17 Beav. 203; *Fenwick's case*, 1 De G. & S.

(*n*) Compare §§ 3, 14, 18.

SECTION II.—CONSEQUENCES AS REGARDS JOINT CREDITORS.

1. *In the case of ordinary partnerships.**a. With reference to what occurred before death.*

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Sect. 2.

Position of executors of deceased partner as regards creditors of the firm.

The position of the executors of a deceased partner, with reference to the creditors of the firm, has, to a considerable extent, been already ascertained. For it has been seen:—

1. That when a partner dies, the creditors of the firm have no remedy at law by which they can obtain payment out of his estate unless he is the last surviving partner; their remedy at law being against the surviving partners, and them only, unless the deceased was under a several, as well as a joint liability (*o*);

2. That even if his liability was several as well as joint, still, if it arose *ex delicto*, his estate is discharged at law; for, as regards torts, *actio personalis moritur cum persona* (*p*);

3. That, notwithstanding the death of a partner, and the effect of such death at law, his estate is liable in equity to the creditors of the firm; and not only in respect of debts contracted in his lifetime, in the ordinary way of business, but also in respect of debts arising from breaches of trust committed in his lifetime by himself, or his co-partners, and imputable to the firm (*q*);

4. That this liability cannot be got rid of by any arrangement between the executors of the deceased and the surviving partners; and that, notwithstanding subsequent dealings between the creditors and the surviving partners, the liability of the executors continues, until it can be shown that the creditors have abandoned their right to obtain payment from the estate of the deceased, or that their demands have, in fact, been paid or discharged (*r*).

(*o*) *Martin v. Crumpe*, 1 Lord Raymond, 340, and 2 Salk. 444. See *ante*, p. 492.

(*p*) See *ante*, pp. 330, 492, and *Davidson v. Tulloch*, 3 MacQu. 783, as to the application of this maxim to Scotland. The 3 & 4 Wm. 4, c. 42, § 2, gives a remedy at law

against the executors of a person who commits a tort within six months of his death, provided such tort affects the real or personal property of the person injured.

(*q*) *Ante*, pp. 372, *et seq.*

(*r*) *Ante*, pp. 421, *et seq.*, and 450-3.

These propositions have been already so fully illustrated in various portions of the present treatise, that it is unnecessary here to do more than collect the cases establishing them.

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Sect. 2.

Summary of
cases.

1. *Cases in which, by death alone, a partner's liability has been extinguished, both at law and in equity :—*

Estate of deceased discharged.

Sumner v. Powell, 2 Mer. 30, and Turn. & R. 423 (*ante*, p. 374).

Clarke v. Bickers, 14 Sim. 639 (*ante*, p. 375).

Wilmer v. Currie, 2 De G. & Sm. 347 (*ante*, p. 375).

2. *Cases in which the estate of a deceased partner has been held liable in equity, although not at law (s) :—*

Estate of deceased not discharged.

Liability in respect of contracts.

Lane v. Williams, 2 Vern. 292.

Simpson v. Vaughan, 2 Atk. 31.

Darwent v. Walton, ib. 570.

Clavering v. Wesley, 3 P. W. 402.

Bishop v. Church, 2 Ves. S. 100 and 371 (*ante*, p. 372).

Jacomb v. Harwood, ib. 265 (*ante*, p. 373).

Burn v. Burn, 3 Ves. 573 (*ante*, p. 373).

Thomas v. Frazer, 3 Ves. 399.

Orr v. Chase, 1 Mer. 729.

Harris v. Farwell, 13 Beav. 403.

Devaynes v. Noble, 1 Mer. 539, and 2 R. & M. 495.

Wilkinson v. Henderson, 2 M. & K. 583 (*post*, p. 1043).

Thorpe v. Jackson, 2 Y. & C. Ex. 553.

Hills v. McRae, 9 Ha. 297.

Brett v. Beckwith, 3 Jur. N. S. 31, M. R. (*post*, p. 1046).

Cheetham v. Crook, McCl. & Y. 307.

Liability in respect of frauds and breaches of trust.

Blair v. Bromley, 2 Ph. 354 (*ante*, p. 310).

Sadler v. Lee, 6 Beav. 324 (*ante*, p. 310).

Vulliamy v. Noble, 3 Mer. 619.

Devaynes v. Noble.

Clayton's case, 1 Mer. 576 (*ante*, pp. 309 and 437).

Baring's case, ib. 612 (*ante*, p. 309).

Ward's case, ib. 624.

3. *Cases in which the estate of a deceased partner has been held liable, notwithstanding dealings between the creditors of the firm and the surviving partners :—*

Estate of deceased not discharged by what has occurred since his death.

Devaynes v. Noble.

Sleech's case, 1 Mer. 539.

Clayton's case, ib. 579 (*ante*, pp. 309 and 437).

Palmer's case, ib. 623.

(s) See the celebrated judgment in *Devaynes v. Noble*, 1 Mer. 539, and 2 R. & M. 495.

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Braithwaite v. Britain, 1 Keen, 206.

Winter v. Innes, 4 M. & Cr. 101 (a very important case).

Harris v. Farwell, 15 Beav. 31 (*ante*, p. 452).

Daniel v. Cross, 3 Ves. 277.

Jacomb v. Harwood, 2 Ves. S. 265 (*ante*, p. 373).

Estate of deceased discharged by what has occurred since his death.

4. *Cases in which the estate of a deceased partner has been held discharged by what has taken place between the creditor and the surviving partners :—*

By general dealings.

Oakley v. Pasheller, 10 Bli. 548, and 4 Cl. & Fin. 207 (*ante*, p. 452).

Brown v. Gordon, 16 Beav. 302 (*ante*, p. 453).

By payment.

Devaynes v. Noble.

Clayton's case, 1 Mer. 572 (*ante*, p. 427).

Merriman v. Ward, 1 J. & H. 371. This case is important as showing that where a debt of a deceased partner has been discharged by the application of the rule in *Clayton's case*, it is not competent for his executors to revive such a debt against his estate.

Statute of Limitations.

The estate of a deceased partner may be discharged by the statute of limitations; and now, by the Mercantile law amendment act payments by the surviving partners will not keep alive the creditor's claim against the executors of the deceased (*t*). The effect in equity of such payments before the passing of the act in question was by no means clearly settled (*u*). In the well-known case of *Winter v. Innes* (*x*), Lord Cottenham expressed a doubt whether the statute could be a bar to a suit against the executors of a deceased partner, if the survivor was still liable at law to pay the debt in respect of which the suit was instituted. His lordship appears to have thought that the right of the surviving partner to contribution from the estate of the deceased would, in such a case, prevent the statute from being a bar to the creditor. It is, however, submitted that the creditor's right to be paid out of

Winter v. Innes.

(*t*) 19 & 20 Vict. c. 97, § 14. See rect.

Thompson v. Waithman, 3 Drew. 628, which, though wrong as regards the retrospective operation of the act (*Jackson v. Woolley*, 8 E. & B. 778), is in other respects cor-

(*u*) See *Thompson v. Waithman*, 3 Drew. 628.

(*x*) 4 M. & Cr. 101. See, also, *Braithwaite v. Britain*, 1 Keen, 206.

the assets of a deceased partner is based upon the principle that the deceased is in equity severally liable to the payment of the partnership debts; and that the right of the creditor is not dependent on the rights of the surviving partner, but exists whether the surviving partner is or is not entitled to contribution from the estate of the deceased. If this be so, it follows that the several liability of the deceased is within the direct operation of the statute of limitations, whether the legal liability of the surviving partners is barred or not. This view moreover is in accordance with more recent cases in which the estate of a deceased partner was held discharged by the statute of limitations, although his will contained a trust for the payment of his debts, and one of his executors was a surviving partner, and had in that character paid the plaintiff interest on his debt (y).

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Whatever doubt there may formerly have been upon the subject, it seems now clearly settled that a creditor of the firm can proceed in equity against the estate of a deceased partner, without first having recourse to the surviving partners, and without reference to the state of the accounts between them and the deceased (z). But it is necessary to make the surviving partners parties to the suit; for although no relief can be obtained in equity against them (their liability being enforceable at law only) they are interested in the issues raised between the creditor and the executors, and must, therefore, be brought before the Court (a). A leading case on this subject is *Wilkinson v. Henderson* (b); the judgment in which is of sufficient importance to be extracted at length. The bill was filed by a creditor of the late firm of *Shepherd and Hartley*, against *Hartley*, and the executors of *Shepherd*, praying for

Right of creditor of firm to be paid out of the estate of a deceased partner.

Wilkinson v. Henderson.

(y) *Way v. Bassett*, 5 Ha. 55; 297.

Brown v. Gordon, 16 Beav. 302;
Thompson v. Waithman, 3 Drew. 628.

(z) See *Devaynes v. Noble*, 2 R. & M. 495; *Thorpe v. Jackson*, 2 Y. & C. Ex. 553.

(a) By being made a party or by being served with notice of the decree, see *Hills v. McRae*, 9 Ha.

(b) 1 M. & K. 582; see, too, *Thorpe v. Jackson*, 2 Y. & C. Ex. 553; *Devaynes v. Noble*, *Sleech's case*, 1 Mer. 539; *Devaynes v. Noble*, 2 R. & M. 495; *Stevenson v. Chiswell*, 3 Ves. 566. As to the plaintiff availing himself of the equities subsisting between the defendants, see *ante*, notes (x) and (y).

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Wilkinson v.
Henderson.

payment out of the estate of the latter. The executors objected that as *Hartley* was solvent, the creditor ought to proceed against him at law (c); and *Hartley* contended that, as no decree could be made against him, he ought not to have been made a party to the suit. With reference to these objections, Sir John Leach observed: "All the authorities establish that, in the consideration of a court of equity, a partnership debt is several, as well as joint. The doubts upon the present question seem to have arisen from the general principle that the joint estate is the first fund for the payment of the joint debts, and that the joint estate, vesting in the surviving partner, the joint creditor upon equitable considerations, ought to resort to the surviving partner, before he seeks satisfaction from the assets of the deceased partner. It is admitted, that if the surviving partner proves to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question, then, is, whether the joint creditor shall be compelled to pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner; or whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, shall appear upon the partnership accounts, to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the deceased partner is, at all events liable to the full satisfaction of the creditors, and must, first or last, be answerable for the failure of the surviving partner; that no additional charge is thrown upon the assets of the deceased partner by the resort to them in the first instance; and that great inconvenience and expense might otherwise be occasioned to the joint creditors; and further that, according to the two decisions in *Sleech's* case, in the cause of *Devaynes v. Noble*, the creditor was permitted to charge the separate estate of the deceased partner, which in

(c) *Cheetham v. Crook*, McClel. & Y. 307, is in accordance with this view.

equity was not primarily liable as between the partners, without first having resort to dividends which might be obtained by proof, under the commission against the surviving partner, I am of opinion that the plaintiff is entitled, in this case, to a decree for the benefit of himself, and all other joint creditors, for the payment of his debt out of the assets of Shepherd, the deceased partner. The remedy against Hartley, the surviving partner, is altogether at law; and I can make no decree against him; but he was properly joined as a defendant to the suit, being interested to contest the demand of the plaintiff, and of all other persons claiming to be joint creditors."

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Since the above case, the right of the creditor of a firm to institute a suit for the administration of the estate of a deceased member of the firm, and for payment of his debts, joint as well as separate, has never been disputed (*d*). If a suit is already instituted for the administration of the estate of the deceased, a creditor of the firm can go in and prove against the estate without being compelled to take any preliminary steps himself (*e*). If he has to institute a suit himself, he may file a bill (*f*); or, if the case is very simple, perhaps proceed by summons in chambers.

Creditor's suit
of administration
of deceased part-
ner's estate.

The right of creditors of the firm to obtain payment of their debts out of the assets of a deceased partner being thus established, their position, as regards the other creditors of the deceased, has next to be determined.

Rights of credi-
tors of firm com-
pared with the
rights of the se-
parate creditors
of the deceased.

From the doctrine that partnership debts are in equity considered several as well as joint, it would logically follow that the creditors of a partnership should be entitled to rank against the assets of the deceased *pari passu* with his separate creditors (*g*). But as will be seen hereafter, it is a rule in

(*d*) In *Rice v. Gordon*, 11 Beav. 265, one of the cases of this class, the debt due to the plaintiff arose out of a transaction in which he had engaged as surety.

(*e*) *Cowell v. Sikes*, 2 Russ. 191; *Gray v. Chiswell*, 9 Ves. 118. In the former there was a petition, but this is now unnecessary.

(*f*) *Hills v. McRae*, 9 Ha. 297, is an instance of a claim; but claims are now abolished. See Cons. order 8, rule 4.

(*g*) See acc. *Burn v. Burn*, 3 Ves. 573, where a bond creditor of the firm obtained a payment as if he had been a separate specialty creditor of the deceased.

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Separate creditors preferred to joint.

Share in firm not available for separate creditors till joint creditors are paid.

Suit by separate creditors.

Brett v. Beckwith.

bankruptcy that the debts of a firm shall be paid out of the assets of the firm, and the separate debts of each partner out of his separate estate: and in administering the estate of a deceased partner courts of equity to some extent (*h*) are guided by analogy to the rules which are followed in bankruptcy. Accordingly it is now held that the separate estate of a deceased partner must be applied in payment of all principal and interest due to his separate creditors before any part of such estate can be touched by the creditors of the firm (*i*); and this rule applies even although the surviving partners may be bankrupt (*k*). If, indeed, there is not, and never was, since the death of the deceased any joint estate whatever, and no solvent partner, it seems that the joint creditors may rank *pari passu*, with the separate creditors of the deceased against his separate estate (*l*).

The separate estate thus primarily liable to the separate creditors of the deceased, does not include his share in the partnership assets; for he has no share in those assets, except subject to the payment of the debts of the firm. Whilst, therefore, the separate creditors of the deceased are entitled to be first paid out of his separate estate, the creditors of the firm are entitled to be first paid out of its assets, and, consequently, to be paid in full before the share of the deceased in those assets becomes available for the payment of his separate creditors (*m*).

Suits by creditors of the firm to obtain payment out of the assets of a deceased partner, are well illustrated by *Brett v. Beckwith* (*n*). In that case there had been two partners, Young and Beckwith. Beckwith was dead, and Young was bankrupt. A bill was filed by a creditor of the late firm against the exe-

(*h*) See *Lodge v. Prichard*, 1 De G. J. & Sm. 610. All the rules in bankruptcy are not followed in administering assets in equity. See *infra*, as to secured creditors.

(*i*) See *Lodge v. Prichard*, 1 De G. J. & Sm. 610, and 4 Giff. 294; *Whittingstall v. Grover*, 10 W. R. 53; *Gray v. Chiswell*, 9 Ves. 118; *Addis v. Knight*, 2 Mer. 117; *Croft*

v. Pyke, 3 P. W. 182.

(*k*) *Lodge v. Prichard*, and *Whittingstall v. Grover*, *ubi sup.*

(*l*) See *Cowell v. Sikes*, 2 Russ. 191; and *Lodge v. Prichard*, *ubi sup.*

(*m*) See *Ridgway v. Clare*, 19 Beav. 111; *Hills v. McRae*, 9 Ha. 297.

(*n*) 3 Jur. N. S. 31, in the Rolls.

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cutors of Beckwith and the assignees of Young, praying for a declaration that Beckwith's real and personal estate was liable in equity, after satisfying his separate debts, to the joint debts of the firm; for an account of such debts at Beckwith's death; for an account of the joint assets received by his executors and Young's assignees; for an account of Beckwith's separate debts; that his real and personal estate might be applied, first in payment of his separate debts, and then in payment of the joint debts; and that a receiver might be appointed to get in the outstanding joint assets. The Court held that the plaintiff was clearly entitled, as a creditor of Beckwith, to have his estate fully administered; and for that purpose to have an account taken of his separate estate; and to have the accounts between Beckwith's executors and Young's assignees also taken, in order to ascertain of what the joint estate consisted; and a decree was accordingly made for taking such accounts.

When a creditor of the firm proceeds against the assets of a deceased partner, the form of the decree which is made is in substance as follows (o):

Decree in suit by
creditors of firm
against the exe-
cutor of a de-
ceased partner.

1. It is declared that all persons who are creditors of the deceased, are entitled to the benefit of the decree.

2. It is declared that the surplus of the estate of the deceased, after satisfying his funeral and testamentary expenses and separate debts, was liable in equity at the time of his death to the joint debts of the firm, but without prejudice to the liability of the surviving partner, as between himself and the estate of the deceased.

3. An account is directed to be taken of the funeral and testamentary expenses and separate debts of the deceased, and of the debts of the firm. If the surviving partner is not a party to the suit, liberty is given him to attend in the prosecution of this last inquiry.

4. An account is directed to be taken of the personal estate of the deceased.

5. It is ordered that his personal estate be applied, in the first instance in the payment of his separate debts and funeral

(o) See *Hills v. McRae*, 9 Ha. 297; *Harris v. Farwell*, 13 Beav. 407; *Rice v. Gordon*, 11 Beav. 271.

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expenses, in a due course of administration, and then in payment of the debts of the firm.

6. And if the personal estate of the deceased is insufficient for the purposes of the suit, inquiries are ordered to be made for the purpose of ascertaining the real estate to which the deceased was entitled.

The decree will, if necessary, direct inquiries whether the creditors of the firm continued to deal with the surviving partners, and what sums have been paid by them to such creditors, and whether the creditors have, by their dealings with the surviving partners, released the estate of the deceased from the payment of their respective debts (*p*).

No directions are usually given for the purpose of keeping distinct the joint and the separate estates; but, if necessary, it is conceived that such directions would be given in order that the principles upon which the decree is framed might be properly carried out (*q*).

Ridgway v.
Clare.

In *Ridgway v. Clare* (*r*) two partners, A. and B., had died. A suit was instituted by a separate creditor of A. for the administration of his estate; a suit was also instituted by a separate creditor of B. for the administration of his estate; a third suit was instituted by a joint creditor of A. and B. for payment of a debt due from both out of both their estates; and a fourth suit was instituted by the representatives of A. against the representatives of B. for taking the accounts of the partnership. The plaintiff in the third suit was found to be a creditor of both A. and B., but he was held by the Master not to be entitled to rank as a separate creditor of A. On an appeal from the decision of the Master, the Court thought it desirable that the separate creditors should be ascertained, but reserved the question whether the joint creditor was or was not entitled to rank as one of A.'s separate creditors. The judgment, however, is instructive, as it states the manner in which the Court administers the assets of a deceased partner, and pays each

(*p*) See the decree in *Devaynes v. Noble*, 1 Mer. 530, and in *Fisher v. Farrington*, Seton on Decrees, 280, ed. 2. See *ib.* ed. 3, p. 550.

271; *Ridgway v. Clare*, 19 Beav. 111; *Woolley v. Gordon*, Tambl. 11; *Paynter v. Houston*, 3 Mer. 297.

(*r*) *Ridgway v. Clare*, 19 Beav.

(*q*) See *Rice v. Gordon*, 11 Beav. 111.

class of creditors. It appears that when there are assets sufficient to pay all the creditors, the estate of the deceased forms one fund, out of which the joint and separate creditors are paid *pari passu*; but that they, and the funds for their payment, are distinguished when the assets are in any way deficient.

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It will be seen hereafter that in bankruptcy a creditor who holds a security, cannot hold his security and prove for his whole debt, nor realise his security and prove for more than the balance then remaining due to him; but in *Bonser v. Cox* (s), it was held that a creditor of a person whose estate was being administered in chancery was entitled to prove for and receive dividends upon the full amount of his debt, although it had been reduced by the realisation of securities and by payments from other sources. A creditor is only entitled to be satisfied his debt, but until he is satisfied he has a right in equity to prove for his whole demand against the estates of all his debtors.

Secured creditors.

The creditors of a partnership having, on the death of one of the partners, a right at law to obtain payment from the surviving partners, and a right in equity to obtain payment out of the assets of the deceased partner, the question arises whether the creditors can enforce both these rights, or whether they can only avail themselves of one of them.

Creditors' right to proceed at law and in equity at the same time.

In the first place, if the creditors proceed at law against the surviving partners, but do not obtain satisfaction, they can afterwards proceed in equity against the estate of the deceased partner (t). So if the surviving partners become bankrupt, and the creditors of the firm prove against their estate and receive a dividend, they may nevertheless afterwards proceed against the estate of the deceased (u).

In the next place, as the creditors of the firm cannot in equity obtain any decree for payment by the surviving partners, but only a decree for payment out of the assets of the deceased partner, there does not appear to be any reason why,

(s) 6 Beav. 84. See, also, *Mason v. Blogg*, 2 M. & Cr. 443.

(t) *Jacomb v. Harwood*, 2 Ves. S. 265.

(u) *Heath v. Percival*, 1 P. W. 682; *Devaynes v. Noble* (*Sleech's case*), 1 Mer. 539.

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even after a decree for the administration of the estate of the deceased, the creditors in question should not also proceed at law against the surviving partners. As, however, a court of equity, in allowing the creditors of the firm to obtain payment out of the assets of a deceased partner, is guided by purely equitable considerations, and regards the interest of the surviving partners (*x*), and moreover professes to act, to some extent, in analogy to what takes place in bankruptcy, if it could be shown that injustice would be produced by allowing the creditor to pursue both his remedies at once, the Court would perhaps compel him to elect between them, or restrain him from proceeding at law (*y*).

One suit against
the executors of
several deceased
partners.

If more than one partner is dead, a creditor of the firm may, it seems, in one suit obtain a decree against the estates of all of the deceased partners.

Brown v.
Douglas.

In a case before the late Vice-Chancellor Shadwell there was a partnership of seven persons, A., B., C., &c., and another partnership, A. and B., composed of two of the members of the first. A. and C. were dead. The surviving partners were bankrupt. The plaintiff, who was a creditor of both firms, filed a bill on behalf of himself and all other the creditors of A., and on behalf of himself and all other the creditors of C., against the real and personal representatives of A., the personal representatives of C., and the assignees of the bankrupts. The bill prayed that an account might be taken of what was due from A. and C. respectively to the plaintiff, and their other joint and separate creditors, and of the personal estates of A. and C., and of the real estate of A., and that the personal estates of A. and C. and the real estate of A. might be applied in payment of their respective debts, as well joint as separate. This bill was demurred to on the ground of multifariousness, but the Vice-Chancellor overruled the demurrer, and held the frame of the suit to be proper in point of form (*z*).

(*x*) See *Ex parte Kendall*, 17 Ves. 525 and 526.

(*y*) If one partner becomes bankrupt, and a creditor of the firm proves against his estate, he cannot afterwards sue the bankrupt and his co-partners jointly at law. See

Bradley v. Millar, 1 Rose, 273. The subject of election in bankruptcy will be examined hereafter.

(*z*) See *Brown v. Douglas*, 11 Sim. 283; *Brown v. Weatherby*, 12 Sim. 6.

b. With reference to what has occurred since death.

Having now examined the position of the executors of a deceased partner, with reference to the creditors of the firm, and in respect of debts existing at the time of the death of the deceased, it is proposed to consider the liability of the assets of the deceased, and of his executors, in respect of what may have taken place since his death.

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With respect to the executors themselves, it is clear that if the executor of a deceased partner carries on the partnership business, the executor becomes personally liable to third parties as if he were a partner in his own right (*a*); and if the executor accepts or indorses bills of exchange or promissory notes either in his own name as executor (*b*), or in the name in which the deceased carried on business (*c*), the executor will be personally liable to be sued on such bills or notes. Whether in such cases the executor is entitled to be indemnified out of the assets of the deceased is altogether another question, and depends upon whether the executor has carried on the business pursuant to the will of the deceased, or the directions of those beneficially interested in his estate.

Personal liability
of executors.

With respect to the direct liability of the assets of the deceased to creditors, it may be taken as a general proposition, that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners: and on that ground it has been held that they cannot be restrained from continuing to carry on the business of the late firm in the old name (*d*).

Liability of
estate of de-
ceased partner
for what occurs
after his death.

In the great case of *Devaynes v. Noble* (*e*), some bills deposited with a firm of bankers were, after the death of one of the partners, misapplied by the surviving partners, and an attempt was made to obtain out of the estate of the deceased,

Devaynes v.
Noble.

(*a*) See *Wightman v. Townroe*, 1 M. & S. 412; *Labouchere v. Tupper*, 11 Moo. P. C. 198; *Ex parte Garland*, 10 Ves. 119; *Ex parte Holdsworth*, 1 M. D. & D. 475.

(*b*) *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24.

(*c*) *Lucas v. Williams*, 3 Giff.

160.

(*d*) *Webster v. Webster*, 3 Swanst. 490, note. But see as to selling goodwill, *ante*, p. 844.

(*e*) *Houlton's case*, *Johne's case*, and *Brice's case*, 1 Mer. 616, &c. See, too, *Vulliamy v. Noble*, 3 Mer.

614.

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the value of the bills so misapplied. But the attempt was not successful; Sir Wm. Grant observing, "If there be no remedy at law against the executors of Mr. Devaynes, I am at loss to understand the equity on which this Court is to interpose to make good the loss against Mr. Devaynes' estate. It has not been incurred by anything that he did or neglected to do. The bills were safely kept as long as he had anything to do with them. From the act of placing them in the custody of a partnership, it followed that upon the death of one of the partners they would fall into the possession of the surviving partners. Mr. Houlton himself, therefore, has virtually placed them there. Mr. Devaynes' executors could not take them away; Mr. Devaynes could not direct his executors to take them away; and though Mr. Devaynes has neither been personally instrumental in the loss, nor personally benefited by it, nor could have prevented it, yet it is contended that it is upon his estate the loss ought to be thrown, and that by a court of equity. I apprehend, however, that it would be the reverse of equity to throw the loss on his estate in such a case as the present. It might be as well contended that if they had thrown the bills into the fire, or lost them by negligence, Mr. Devaynes would be responsible for such act or negligence. He had no more to do with the sale of the bills than he would have had to do with a loss occasioned by such means as these."

Liability of the
assets for the
acts of the
executor.

Moreover, although an executor has power to dispose of the assets of the deceased, and to keep alive demands against them which would otherwise become barred by the statute of limitations, still the acts of an executor, to whatever extent they may render him personally liable, do not impose liability on the assets of the deceased, unless those acts have been properly performed by the executor in the execution of the trusts reposed in him. At the same time, there are acts which, if done by an executor, impose liability on the assets of the deceased even in a court of law (*f*); and, therefore, if a partner appoints a co-partner his executor, and dies, and the executor continues to carry on the business, it is possible that his acts,

(*f*) See Williams on Executors, vol. ii. p. 1636, &c., ed. 6.

attributed to him, not as partner but as executor, may render the assets of the deceased liable for what may have occurred since his death (g). Bk. IV. Chap. 1.
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If an executor of a deceased partner carries on the partnership business pursuant to directions contained in the will of his testator, the executor will, as already pointed out, render himself personally liable for debts contracted in so doing, but he will be entitled to indemnity in respect thereof out of the estate of the deceased ; and consequently, if a deceased partner has himself directed his assets or any part thereof to be employed in carrying on the partnership business, so much of them as are directed to be employed, are liable to make good the debts contracted during their employment. For these reasons, and to this extent, therefore, his estate will in equity be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. In such a case, the creditors are better off than the creditors of ordinary partners, inasmuch as these last have nothing to look to except the property of the partners ; whereas, in the case supposed, the creditors have not only the personal security of those who carry on the business, but also something very like a lien on the assets of the deceased employed therein (h). Effect of employment of assets in the business of the firm.

The cases which have occurred upon this subject, have for the most part arisen where the executor, having continued the business with the surviving partner, and having become bankrupt with him, has endeavoured to withdraw from the joint estate the assets of the deceased employed in the trade. In such cases, the executor has been held entitled to prove for the value of the assets which he embarked in the business without authority, such assets being in substance an unauthorised loan of trust money ; but he has been held not entitled to prove as against joint creditors for the value of those assets which his testator authorised to be so continued in the business. Proof by the executor in the event of bankruptcy.

In *Ex parte Garland* (i), a miller and farmer made a will whereby he directed his wife to carry on his business, and that Ex parte Garland.

(g) See *Vulliamy v. Noble*, 3 Mer. 614. notes. (i) 10 Ves. 110.

(h) See the cases in the next two

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for the purpose of enabling her to carry it on, any sum not exceeding 600*l.* should be advanced to her by his trustees. He also directed his wife to give her notes of hand for what might be advanced, and for the value of the stock, crops, and effects in his business. He appointed his wife and the trustees before alluded to his executors. After his death, his widow carried on the business, the stock, crops, and effects in which were valued at 1351*l.* 5*s.* 0*d.* She also received 600*l.* from the trustees for the purpose of enabling her to carry on the business, and for these two sums she gave them her promissory notes. She also became indebted to the estate of the testator in a further sum of 768*l.* 12*s.* 4*d.* She then became bankrupt, and an attempt was made to prove as debts due from her to the estate of the deceased, these three sums of 1351*l.* 5*s.* 0*d.*, 600*l.*, and 768*l.* 12*s.* 4*d.* But it was held by Lord Eldon, that although the last sum might, the two first could not be proved against her estate; for they represented property which the deceased had authorised to be embarked in trade, and which was therefore answerable to the creditors of the trade.

The above decision has been followed by others, and its propriety has never been questioned (*k*).

Creditors before
death preferred
to subsequent
creditors.

The liability of the estate of a deceased partner to persons who become creditors after his decease, is subject to its liability to those who were his creditors at his decease. These last must first be paid; and although, as in such a case as *Ex parte Garland*, they might not be able to follow the assets of the deceased into the hands of the assignees in bankruptcy, yet, in administering the estate of a person whose assets have been employed in trade in pursuance of directions contained in his will, the creditors who have become such since his decease, cannot compete with his other creditors (*l*).

Amount of estate
liable where as-
sets are directed

It has at various times been contended that when a testator directs a trade or business to be carried on after his decease,

(*k*) See, in addition to the case last cited, *Ex parte Richardson*, Buck, 202, and 3 Mad. 138; *Thompson v. Andrews*, 1 M. & K. 116; *Cutbush v. Cutbush*, 1 Beav. 184; *Scott v. Izon*, 34 Beav. 434. In this last case it was attempted to make an

executor responsible for not having proved, but the attempt failed, owing mainly to lapse of time and the impossibility of taking the necessary accounts.

(*l*) See *Cutbush v. Cutbush*, 1 Beav. 184.

he thereby subjects *all* his assets to the payment of debts incurred in the course of carrying it on; and a decision by Lord Kenyon (*m*) has been supposed to warrant such contention. It is now, however, clearly settled, that the extent of the liability of the testator's estate does not exceed the amount authorised by him to be employed in the trade or business directed by him to be carried on (*n*); and it is generally admitted that the decision referred to is not inconsistent with this doctrine (*o*).

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to be continued
in the business.

It becomes, therefore, a matter of considerable importance, not only to executors but to creditors, to ascertain what a testator who directs his trade or business to be carried on has authorised to be employed in carrying it on. This must, of course, depend on the terms of his will; but it has been held that a general direction to carry on a business in which the testator was engaged at the time of his death, does not authorise the employment, for the purposes of that business, of more of his assets than are embarked therein when he dies (*p*). It has also been held, that a bequest by a person of money upon trust to allow it to remain in the concern of which he is a partner, does not necessarily empower the trustees to trade with that money; for the context may show that all the testator meant was that the sum in question should not be called in, but be allowed to remain outstanding as a loan to the surviving partners (*q*).

Effect of general
direction to
carry on trade.

(*m*) *Hankey v. Hammock*, Buck, 210, and 3 Mad. 148.

L. J., in 4 De G. Mac. & G. 744.

(*n*) See the cases in the last three notes, and *McNeillie v. Acton*, 4 De G. Mac. & G. 744.

(*p*) See *McNeillie v. Acton*, 4 De G. Mac. & G. 744, where further capital was required.

(*o*) See the observations of Turner,

(*q*) See *Travis v. Milne*, 9 Ha. 141.

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CONSEQUENCES OF DEATH AS REGARDS JOINT CREDITORS.

(Continued.)

2. In the case of companies.

Liability of executors of shareholders to creditors of companies.

The legal position of the executors of a deceased member of a company is, as regards the creditors of the company, *primâ facie* the same as the legal position of the executors of an ordinary partner with respect to the creditors of the firm. Whether the company is incorporated or unincorporated, its creditors have, *primâ facie*, no legal *locus standi* against executors; and unless the deceased was under a several as well as a joint liability to the creditors of the company, the latter can only proceed at law against the executors of the former in one of two cases: viz., first, where the creditors are specially empowered to do so by some statute; or secondly, where the executors have themselves become shareholders, and liable as such to the debts of the company. Several cases have been decided at law in which executors, not being themselves shareholders, have been held not liable to creditors of companies (r); but the writer has not met with a single instance in which a creditor of a company has at law succeeded in establishing a case against executors in their representative capacity (s).

Equitable liability of estate of deceased shareholder.

With respect to the right of a creditor of a company to proceed in equity against the executors of a deceased shareholder, a distinction must be taken between unincorporated and incorporated companies; for whilst the assets of a deceased shareholder in an unincorporated company are *primâ facie*

(r) *Ness v. Armstrong*, 4 Ex. 21, where the executors had received dividends; *Powis v. Butler*, 3 C. B. N. S. 645, and 4 ib. 469, where the deceased's name was kept on the register of shareholders; *Poole v. Knott*, 7 W. R. 527, where the deceased had died before the creditor had obtained judgment against the company.

(s) The doubt expressed in *Ricketts v. Bowhay*, 3 C. B. 889,

is removed by the decision in *Ness v. Armstrong*, 4 Ex. 21; and the case of *Ness v. Bertram*, 4 Ex. 191, turned entirely on a point of pleading. Even if a creditor can proceed against the estate of a deceased shareholder at law, he will be restrained from so doing if a decree has been made for administering such estate, *Re Walton*, 23 Beav. 480.

liable in equity to the debts of the company contracted before his decease, the assets of a deceased member of a body corporate are, *prima facie*, not liable in equity, any more than at law, to the payment of the debts thereof. But as regards both classes of companies, the position of executors in fact depends less on general principles than on particular statutes, the provisions of which must therefore not be overlooked. Thus, although banking companies governed by 7 Geo. 4, c. 46, are not corporate bodies, and although creditors of such companies are, it seems, entitled to obtain payment of their debts out of the assets of a deceased shareholder, still the creditors' rights are so far modified by the act in question, that, whether they are creditors by specialty or by simple contract, the lapse of three years after the death of a shareholder bars their claims against his executors (*t*); and even within that period the executors are only liable to pay such debts as the surviving shareholders are unable to discharge (*u*).

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The liabilities of executors as contributories under the Winding up acts, will be alluded to hereafter; it may, however, be observed, that their liability to calls under those acts, is not confined to calls made for the payment of debts incurred by the company prior to their testator's decease (*x*).

Executors as
contributories.

SECTION III.—CONSEQUENCES AS REGARDS THE SEPARATE CREDITORS, LEGATEES, AND NEXT OF KIN OF THE DECEASED.

In considering the consequences of the death of a partner or shareholder, as regards his separate creditors, and his legatees, or next of kin, it will be convenient, first of all, to examine their rights under ordinary circumstances, and then to advert to the complicated questions which arise when the assets of the deceased, instead of being realised, are allowed by his executors to be employed in the business carried on by the

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(*t*) See *Barker v. Buttress*, 7 Beav. 134. pare *Re Walton*, 23 Beav. 480.

(*x*) See *Blakeley's case*, 13 Beav.

(*u*) *Heward v. Wheatley, Ex parte Wilson*, 5 De G. & S. 552. Com- 133, and 3 Mac. & G. 726.

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 Sect. 3. companies are specifically bequeathed.

Rights of separate creditors and legatees generally.

Legatees, &c., of
 deceased partner
 must look to his
 executor.

Under ordinary circumstances, the separate creditors, legatees, and next of kin of a deceased partner, must look for payment of what is due to them out of his assets, to his legal personal representative, and to him alone (*y*). The executors are, under ordinary circumstances, the only persons who have a right to call upon the surviving partners for an account, and of this right they do not divest themselves by a sale and assignment of the share of the deceased; for the effect of such sale and assignment is only to make the executors trustees for the purchaser (*z*).

Stainton v. The
 Carron Company.

The leading modern case illustrating the doctrine that the executors of a deceased partner are, under ordinary circumstances, the only persons entitled to require an account from the surviving partners, is *Stainton v. The Carron Company* (*a*). There a bill was filed by the residuary legatees of a person who had been the agent of and a shareholder in a company, against his executors and other persons interested in the will of the deceased, and against the company. The bill charged that one of the executors was an agent and manager of the business of the company, and that he and another executor were large shareholders therein, and that a third executor was also an agent and manager, and was entitled under the will of the testator to ten shares in the company, and that all three executors had interests conflicting with their duties as executors and trustees; and the bill prayed (amongst other things) that the company might transfer the testator's shares to his executors, and that an account might be taken of what was due from the company to his estate, and for payment to the executors of the amount to be found due. The company and

(*y*) *Alsager v. Rowley*, 6 Ves. 748; *Saunders v. Druce*, 3 Drew. 140. If there is no person who in this country represents the deceased, a representative will be appointed.

See *Maclean v. Dawson*, 5 Jur. N. S. 1091.

(*z*) *Clegg v. Fishwick*, 1 Mac. & G. 294.

(*a*) 18 Beav. 146.

one of the executors demurred, and their demurrers were allowed. In delivering judgment the Master of the Rolls thus summed up the effect of the cases on this subject: "The persons interested in the estate of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate." And again: "To support such a bill as this it is not sufficient to prove that it may be an unpleasant duty to the executors and trustees to take the necessary steps for protecting the property entrusted to them. It is not sufficient to show that it will be for their interest not to take such steps; it is necessary to show that they prefer their interest to their duty, and that they intend to neglect the performance of the obligation incidental to the office imposed upon them by the testator, and which they have undertaken to perform."

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The executors, it may be observed, have, in ordinary cases, a personal interest in getting in the assets of the deceased; for, if they wilfully neglect so to do, they will be made to account for them, although they may not actually have received them (b).

Wilful default.

It must not, however, be supposed that in a suit against the executor of a deceased partner by a separate creditor, legatee, or next of kin, no account of the deceased partner's share in the partnership can be decreed or taken; for it is the common course in such a suit to direct an inquiry what is due to the estate of the deceased in respect of such share (c). But in a suit of this description the surviving partners can only be treated as witnesses; no decree can be made against them for payment of what is due on the account, and the executors must, if necessary, take proceedings against them to obtain such payment.

Taking partnership account in suit against executor alone.

(b) See as to charging the executor of a partner with wilful default, *Ward v. Ward*, 2 Ho. Lo. Ca. 777, and *Rowley v. Adams*, ib. 726, and 7 Beav. 395; *Kirkman v. Booth*, 1

Beav. 273. See, also, *Grayburn v. Clarkson*, 2 Weekly N. 29, *infra*, p. 1072.

(c) As in *McDonald v. Richardson*, 1 Giff. 81.

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It seems that, under an ordinary decree for the administration of the estate of a deceased partner, the partnership accounts will not be gone into, unless the decree specially directs some inquiry to be made with reference to the share of the deceased (*d*). But it is difficult to see how any account of his personal estate can be taken without such an inquiry; and it has been decided more than once, that if the surviving partners seek to obtain payment of a balance from the estate of the deceased on the partnership accounts, these accounts must be taken, although no special direction as to them may be contained in the decree (*e*).

Cases in which the legatees, &c., of a deceased partner have a right to an account from the surviving partners.

Notwithstanding, however, the general rule that the separate creditors, legatees, or next of kin of a deceased partner have no *locus standi* against his surviving partners, this rule is by no means without its exceptions. Indeed there are cases to be met with, which apparently warrant the inference, that surviving partners may always be sued along with the executor or administrator of the deceased (*f*). But the authority of these cases has recently been called in question, and the better opinion now is that some special circumstances are necessary to justify such a course (*g*). The special circumstances which have been held sufficient are, collusion between the executors and the surviving partners (*h*); refusal by the former to compel the latter to come to an account (*i*); dealings which may have precluded the executors from themselves obtaining any account (*k*); the fact that the executors are themselves partners, and liable therefore to account as partners to themselves as executors (*l*). And generally, where the relation between the

(*d*) See the next note.

(*e*) See *Paynter v. Houston*, 3 Mer. 297; *Baker v. Martin*, 5 Sim. 380; *Woolley v. Gordon*, Tambl. 11.

(*f*) See *Newland v. Champion*, 1 Ves. S. 106, and 2 Coll. 46; *Bowsher v. Watkins*, 1 R. & M. 277.

(*g*) See *Davies v. Davies*, 2 Keen, 534; *Law v. Law*, 2 Coll. 41; *Travis v. Milne*, 9 Ha. 141; *Stainton v. The Carron Co.*, 18 Beav. 146.

(*h*) *Doran v. Simpson*, 4 Ves. 651; *Gedge v. Traill*, 1 R. & M.

281, note; *Alsager v. Rowley*, 6 Ves. 748.

(*i*) *Burroughs v. Elton*, 11 Ves. 29; the prayer of the bill in this case may be usefully referred to.

(*k*) *Law v. Law*, 2 Coll. 41, and on appeal, 11 Jur. 463; *Braithwaite v. Britain*, 2 Keen, 206.

(*l*) *Cropper v. Knapman*, 2 Y. & C. Ex. 338; *Travis v. Milne*, 9 Ha. 141; and see as to continuing the deceased's assets in the business, *post*, p. 1062.

executors and the surviving partners is such as to present a substantial impediment to the prosecution, by the executors, of the rights of the persons interested in the estate of the deceased, against the surviving partners, there it has been said, a suit may be instituted by those persons against the executors and the surviving partners (*m*).

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Moreover, if the surviving partners are sued with the executor of the deceased partner and do not demur, they must in their answer give such discovery as to the partnership dealings and transactions as the plaintiff may require. They cannot protect themselves from such discovery by submitting by their answer that they ought not to have been joined as defendants (*n*).

Surviving partners should demur if improperly sued.

If the surviving partners and the executors are different persons, and they have *bonâ fide* come to an account respecting the partnership affairs, and have settled such account as a final account, the account thus settled is binding, as between the surviving partners and the persons interested in the estate of the deceased partner, and cannot be impeached, save on the ground of fraud (*o*). And the power of the executors of a deceased partner to make binding arrangements with the surviving partners is considerably enlarged by 23 & 24 Vict. c. 145, § 30, which enacts that "it shall be lawful for any executors to pay any debts or claims upon any evidence they may think sufficient, and to accept any composition or any security, real or personal, for any debts due to the deceased, and to allow any time for payment for any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration, all debts, accounts, claims and things whatsoever, relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instruments of composition, releases and other things, as they shall think expedient, without being responsible for any loss to be occasioned thereby."

Accounts settled between surviving partners and the executors of a deceased partner.

23 & 24 Vict. c. 145, § 30.

But arrangements made between executors and surviving partners for the benefit of the executors individually are always liable to suspicion; and if the executors are themselves the

Where executors are personally interested.

(*m*) *Travis v. Milne*, 9 Ha. 150.

(*o*) *Davies v. Davies*, 2 Keen, 534;

(*n*) *Leigh v. Birch*, 32 Beav. 399.

Smith v. Everitt, 27 Beav. 890.

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surviving partners, or some of them, it becomes exceedingly difficult to make any arrangement which will be binding on the persons interested in the estate of the deceased; for even if any arrangement is assented to by such persons, it will be liable to be successfully disputed, on any of those numerous grounds which are held to invalidate arrangements between trustees and their *cestuis que trustent*, and by which trustees do, or may, obtain a benefit at the expense of the trust estate. A remarkable instance of this is afforded by the case of *Wedderburn v. Wedderburn* (*p*), where an account of a deceased partner's estate was directed, at the suit of the persons beneficially interested therein, although thirty years had elapsed since his death, and several changes had taken place in the firm, and releases had been given to the executors by their *cestuis que trustent* (*q*).

Rights of separate creditors and legatees when the share of the deceased is not got in.

Rights of legatees, &c., when the assets of the deceased partner are continued in the business.

Executors, unless authorised by their testator so to do, ought not to leave his assets out-standing in the trade or business in which he was engaged when he died. It has been laid down as a rule without exception, that to authorise executors to carry on a trade, or to permit it to be carried on with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the testator for that purpose (*r*). A bequest of his share and interest in the partnership to one person for life, and then to another, does not, without more, warrant the trustees of his will in keeping such share and interest unconverted into money; and it is therefore their duty to realise it, and invest what they receive for the benefit of the legatees (*s*).

Where an executor improperly employs the assets of the

(*p*) 2 Keen, 722, and 4 M. & Cr. 1, noticed *ante*, p. 997.

(*q*) See the other cases as to profits accruing since death, *ante*, pp. 992 *et seq.*

(*r*) *Kirkman v. Booth*, 11 Beav. 273. A power to executors named

in a will to carry on a business does not justify an administrator in so doing if all the executors renounce, *Lambert v. Rendle*, 3 New R. 247.

(*s*) *Kirkman v. Booth*, 11 Beav. 273. See *Skirving v. Williams*, 24 ib. 275.

testator in a business carried on by himself, he is chargeable, at the option of the persons beneficially interested in the estate of the deceased, either with the sum employed and interest thereon at 5% per cent., or with the sum employed and the profits made by its employment (*t*). And such persons are not deprived of this option by the circumstance that it will be difficult and expensive to ascertain what part of the profits has arisen from the employment of the assets of the deceased; for whatever difficulty may exist is attributable to the conduct of the executor himself, and cannot therefore be effectually urged by him as a reason why no account of profits should be taken (*u*). But the *cestuis que trustent* are not entitled to compound interest unless there are some special circumstances in the case, *e. g.*, a trust to invest and accumulate the profits (*x*); nor are they entitled to profits for part of the time and to interest for the rest unless there has been some intervening settlement of account (*y*), or other special circumstance (*z*).

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Option between
interest and
profits.

It follows from the doctrine above stated, and from the principles which were explained when treating of decrees for account (*a*), that if one of two partners makes the other his executor, and dies, the surviving partner must not only account to the estate of the deceased for what may be due, in respect of the testator's share in the partnership at his death (*b*), but also for the profits made since his death, by the employment of his capital in the business carried on by the late firm (*c*). Moreover it is immaterial whether such business has been continued by the surviving partner alone, or by him and others in partnership with him (*d*); for the obligation of the executor thus to account, is founded on a breach of trust committed by him, for which he is liable at all events, whether other persons

Profits made
since death.

(*t*) See *Docker v. Somes*, 2 M. & K. 655; *Palmer v. Mitchell*, ib. 672, note; *Heathcote v. Hulme*, 1 J. & W. 122.

(*u*) *Docker v. Somes*, 2 M. & K. 655; *Townend v. Townend*, 1 Giff. 201.

(*x*) See Lewin on Trusts, 256, ed. 4.

(*y*) *Heathcote v. Hulme*, 1 J. &

W. 122.

(*z*) As in *Townend v. Townend*, 1 Giff. 201, noticed *ante*, p. 993.

(*a*) *Ante*, pp. 988, *et seq.*

(*b*) See the cases cited, *infra*.

(*c*) *Phillips v. Phillips*, Finch, 410.

(*d*) *McDonald v. Richardson*, 1 Giff. 81.

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are also liable or not ; and being founded on a breach of trust, a suit in respect of it may be sustained against the executor alone, although he may be only one of several, by whom the profits have been made (e).

The cases illustrating the right of legatees to an account of profits made since their testator's death where the executors have continued his assets in the business in which he was a partner have been already adverted to at considerable length (f). The following classified list of them is inserted here for reference.

1. *Account of subsequent profits decreed.*

A. Executors against surviving partners.

Brown v. De Tastet, Jac. 284 (*ante*, p. 990).

Booth v. Parks, 1 Moll. 465, and Beatty, 444.

Featherstonhaugh v. Turner, 25 Beav. 382.

Smith v. Everitt, 27 Beav. 446.

B. Legatees against executors who were not partners, but who continued his assets in his business.

Heathcote v. Hulme, 1 J. & W. 122.

Docker v. Somes, 2 M. & K. 654.

Palmer v. Mitchell, 2 M. & K. 672, note.

C. Legatees against executors who were surviving partners or who became partners.

Cook v. Collingridge, Jac. 607 (*ante*, p. 992).

Stocken v. Dawson, 9 Beav. 239, and on appeal, 27 L. J. Ch. 282.

Wedderburn v. Wedderburn, 2 Keen, 722, and 4 M. & Cr. 41 (*ante*, p. 997).

Townend v. Townend, 1 Giff. 201 (*ante*, p. 993).

Willett v. Blandford, 1 Ha. 253 (*ante*, p. 995). In this case accounts of subsequent profits were directed without prejudice to any question.

2. *Account of subsequent profits refused.*

A. Executor against surviving partner.

Knox v. Gye, (*ante*, pp. 980 and 998).

B. Legatee against executors, one of whom was a surviving partner, and the other of whom had become a partner.

Simpson v. Chapman, 4 De G. Mac. & G. 154 (*ante*, p. 996).

See, also, *Wedderburn v. Wedderburn*, 22 Beav. 84, and *Willett v.*

Blandford, 1 Ha. 253 (*ante*, pp. 995, 997).

(e) *McDonald v. Richardson*, 1 Giff. 81; and compare *Simpson v.* *Chapman*, 4 De G. Mac. & G. 154. (f) *Ante*, pp. 988, *et seq.*

Upon the principle that every one concerned in a breach of trust with notice of the trust is answerable for such breach, it follows that if a partner dies, and his surviving partners allow his assets to remain in their business, with the knowledge that to suffer them so to remain is a breach of trust on the part of the executors, the surviving partners will be themselves responsible to the separate creditors, legatees, or next of kin of the deceased, for any loss which may be thereby sustained (*g*). And further, inasmuch as it is, *prima facie*, a breach of trust for executors to allow the assets of the deceased to remain in the business carried on by him at his death, surviving partners who knowingly carry on the business with assets of the deceased thus left in their hands will be answerable for such assets, unless they can show that no breach of trust was in fact committed (*h*).

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Liability of surviving partners for assets improperly continued in the business.

Where, however, the surviving partners and the executors are different persons, and the executors distinctly lend part of their testator's assets to his surviving partners, the latter are only liable to pay interest for it, at the rate agreed upon with the executors. In such a case the legatees are not entitled to a share of the profits made by means of the money lent, although in lending it the executors may have been guilty of a breach of trust, and the borrowers may have known that the money belonged to the deceased (*i*).

Loans by executors.

A fortiori, if the executors are authorised to lend part of the assets of the deceased to his surviving partners, they will not be accountable for the profits they may make by the employment in their trade of money lent to them by the executors in pursuance of their authority (*k*); nor, in such a case as is now supposed, will the executors be responsible for the money if lost, if they took such security for its repayment as, having regard to the will of the testator, it was their duty to take (*l*).

(*g*) See *Wilson v. Moore*, 1 M. & K. 127 and 337; *Booth v. Booth*, 1

Beav. 125, and compare *Ex parte Barnewall*, 6 De G. Mac. & G. 801.

(*h*) *Travis v. Milne*, 9 Ha. 141.

(*i*) See *Stroud v. Gwyer*, 28 Beav. 130, and Lewin on Trusts, pp. 213,

214, ed. 4, and 23 & 24 Vict. c. 145, § 30.

(*k*) *Parker v. Bloxham*, 20 Beav. 294.

(*l*) *Paddon v. Richardson*, 7 De G. Mac. & G. 563.

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Executor becoming a partner.

It sometimes happens that the executor of a deceased partner is taken into partnership by the surviving partners, and a question then arises whether the profits received by the executor as partner belong to him personally, or to the estate which he represents. This must depend on the circumstances under which the executor became a partner. If he became a partner in his representative character, or as in *Cook v. Collingridge* (m), under circumstances entitling the legatees to treat him still as their trustee, he must account for any profits which he may have obtained as a partner. On the other hand if, as in *Simpson v. Chapman* (n), he became a partner not in his representative character, nor under such circumstances as those above mentioned, the profits accruing to him as a partner will be his own, and not form part of the assets for which he must account as executor.

Specific bequests of shares.

Legacy of a share in a partnership.

A specific bequest by a partner of his share in the partnership clearly does not entitle the legatee to become a partner himself unless there is some agreement to that effect binding upon the surviving partners. The right of the legatee is simply to be paid the amount due to the testator at the time of his death in respect of his share, and also under the circumstances and subject to the qualifications already noticed (o), to receive a proportion of the profits made since the testator's death. As between the legatee, however, and the executor, the legatee is entitled to have the share kept in the business, subject only to the superior right of the executor to sell the testator's personal estate for the payment of debts (p).

A bequest of a partner's capital has been held to include what was due to him in respect of advances (q).

Legatee of good-will.

In a late case (r) it was held that the legatee of a deceased partner's share in the good-will of the partnership

(m) Jac. 607, ante, p. 992.

(n) 4 De G. Mac. & G. 154, ante, p. 996.

(o) Ante, p. 1063.

(p) See *Fryer v. Ward*, 31 Beav.

602, where the legatee had an option.

(q) *Bevan v. A.-G.*, 4 Giff. 361.

(r) *Robertson v. Quiddington*, 28

Beav. 529.

business could not sue the surviving partners for a sale of the good-will and payment of his share, although the bequest had been assented to by the executors. This case was somewhat peculiar, as in truth the surviving partner was entitled to everything which gave a saleable value to the good-will (s).

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Shares in companies will not ordinarily pass under a bequest of bonds and securities (t). But under special circumstances they will pass even under a bequest of money, as in *Knight v. Knight* (u), where share certificates were in an envelope indorsed to be considered as money and given to A. B.

Legacies of
shares in com-
panies.

Where a person entitled to various kinds of shares in a company bequeaths some of them without saying which in particular, the legatee can select which he pleases (x).

A legacy of — shares will pass stock if the testator had no shares (y).

A specific bequest of a share in a partnership will be adeemed if the testator, after he has made his will, leaves the firm and receives his share; but so long as he remains a partner there will be no ademption, although by some agreement subsequent to the date of the will, the amount of his share may have been varied (z).

Ademption of
legacies of
shares.

A legacy of shares in a company is not adeemed by the conversion of such shares into stock (a); nor, necessarily, by the amalgamation of that company with another (b).

A legatee of shares may, of course, decline to accept them, and he may do so although he accepts another legacy under the same will (c).

Where a share in a company is bequeathed to a person absolutely, the executors should transfer it to the legatee as soon as possible, in order that the liability of the testator's estate in

Absolute lega-
cies.

(s) See on this subject, *ante*, p. Eq. 695.
843.

(t) *Huddleston v. Goldsbury*, 10 260; *Ellis v. Walker*, *ib.* 309.
Beav. 547.

(u) 2 Giff. 616. (a) *Oakes v. Oakes*, 9 Ha. 666.

(x) *Millard v. Bailey*, L. R. 1 Beav. 194. (b) See *Phillips v. Turner*, 17

Eq. 378. (c) *Long v. Kent*, 6 New R. 354,

(y) *Trinder v. Trinder*, L. R. 1 V.-C. S.

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respect of it may be put an end to (*d*). If the legatee is not *sui juris*, and the share cannot be transferred into his name, the position of the executors becomes embarrassing. If, however, they do nothing with the share, but simply take the dividends as executors, they will not render themselves personally liable to creditors (*e*), nor will they be liable to be made contributories, otherwise than in their representative capacity (*f*). But it may happen that, unless the executors transfer the share into the names of themselves or some other persons, the share will become forfeitable; and in that case (the legatee of the share being still supposed to be not *sui juris*) the executors must, for their own protection, apply for the direction of the Court of Chancery.

Legacies for life.

Where shares are bequeathed to one person for life with remainder to another, they ought nevertheless to be sold, unless it is clearly the testator's intention that they shall be retained *in specie* (*g*). If they are intended to be enjoyed *in specie*, the position of the executors again becomes embarrassing; for if they transfer the shares into the name of the tenant for life, there is nothing to prevent him from selling them for his own use, and in case of a sale of the shares by him, the remainder man would naturally seek to make the executors responsible for their loss. If, on the other hand, the executors procure the shares to be transferred into their own names as trustees for the legatees, a personal liability in respect of the shares will be incurred by the executors, and that liability will not be limited by the amount of the assets of the testator. Unless, therefore, the executors can retain the shares without transferring them, they must, for their own safety, apply for the direction of the Court of Chancery.

Probate duty.

Where shares are bequeathed to one person for life, with remainder to another, and are transferred into the name of the tenant for life, they will, on his death, be transferable into the name of the remainder man without being covered by the

(*d*) See *Keene's ex. case*, 3 De G. Mac. & G. 272.

(*e*) *Ness v. Armstrong*, 4 Ex. 21.

(*f*) This subject will be adverted to hereafter when treating of Contributories.

(*g*) See *Blann v. Bell*, 2 De G. Mac. & G. 775; *Thornton v. Ellis*, 15 Beav. 193; *Crowe v. Crisford*, 17 ib. 507; and see as to shares in partnerships, *ante*, p. 1062.

probate duty payable in respect of the tenant for life's estate (*h*). Such shares, in fact, form no part of his estate, and are covered by the duty payable on account of the estate of the original testator.

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Where shares are bequeathed, not specifically, to one person for life, and after his death to another, the money yielded by them before sale will not necessarily belong to the tenant for life; for, according to the case of *Dimes v. Scott* (*i*), the tenant for life is only entitled to the income which would have been obtained if the shares had been sold and the produce invested in consols, at the end of a year from the testator's death: the income thus ascertained being, however, paid from the date of the death. This rule applies where the testator's residuary estate consists of shares when he dies. But it has been held that the rule does not apply where the executors themselves make an unauthorised investment; and that in such a case the tenant for life is entitled to the income actually yielded by the investment, and the remainderman is not entitled to more than a restoration of the original capital (*k*).

Income before
sale.

Where the legacy is specific, the rule in *Dimes v. Scott* does not apply, the legatee taking whatever the shares may yield (*l*). So where the shares, although not specifically bequeathed, are directed by the will not to be sold for a certain time, what they yield during that time will belong to the tenant for life (*m*).

It appears to be now settled, that when shares are specifically bequeathed, and the will contains no special directions to the contrary, all calls made upon the shares in the testator's lifetime must be borne by his general personal estate; whilst all those made after his death must be borne by the legatee taking the shares (*n*). There are, indeed, cases which show that calls made after the testator's death are payable out of his general

Payment of
calls.

(*h*) *Hennell v. Strong*, 25 L. J. Ch. 407.

(*i*) 4 Russ. 195, and see *Fearns v. Young*, 9 Ves. 549.

(*k*) See *Stroud v. Gwyer*, 28 Beav. 130.

(*l*) *Infra*.

(*m*) See *Green v. Britten*, 1 De G.

J. & Sm. 649. Where the sale is postponed by the Court for the benefit of infants, see *Lambert v. Rendle*, 3 New R. 247.

(*n*) See *Re Box*, 1 Hem. & M. 552, and *Day v. Day*, 1 Dr. & Sm. 261, where all the previous cases are reviewed.

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estate, and not by the specific legatee (*o*); but these cases are not to be relied upon, except where the payment of the calls would have been a condition precedent to the completion of the testator's own title to the shares if he himself had lived (*p*), and the calls are made before the specific legatee is, by the terms of the will, to have the shares (*q*).

Indemnity fund
to meet calls.

Where shares are specifically bequeathed, and calls upon them are payable out of a testator's residuary estate, a fund ought to be set apart for the indemnity of the specific legatee (*r*); but, where the assets of the deceased are insufficient for the payment of his debts, no fund to meet future calls ought to be set apart to the prejudice of even simple contract creditors (*s*).

Dividends.

A specific legatee of shares is entitled to all dividends declared after his testator's death (*t*); but not to dividends declared previously, and payable afterwards (*u*), unless there are some special circumstances excluding this general rule (*x*). A dividend declared before the death of a tenant for life, but not payable until afterwards, belongs to his estate, and not to the remainderman (*y*).

Distinction be-
tween dividends
and bonuses.

In determining the relative rights of a tenant for life and a remainderman of shares, specifically bequeathed, a distinction is taken between dividends and bonuses, *i.e.*, between payments out of profits recently accrued, and payments out of accumu-

(*o*) *Blount v. Hipkins*, 7 Sim. 51; *Clive v. Clive*, Kay, 600; *Jacques v. Chambers*, 4 Ra. Ca. 499, correcting S. C., 2 Coll. 435; *Wright v. Warren*, 4 De G. & S. 367.

(*p*) As to this qualification, see *Armstrong v. Burnet*, 20 Beav. 424; *Addams v. Ferick*, 26 ib. 384; and *Day v. Day*, *ubi supra*.

(*q*) *Re Box*, 1 Hem. & M. 522, where the testator's residuary estate, including the shares, was bequeathed to A. for life, and after his death the shares were specifically bequeathed to B, and the calls were made in A.'s lifetime.

(*r*) *Jacques v. Chambers*, 4 Ra. Ca. 499.

(*s*) *Wentworth v. Chevell*, 3 Jur. N. S. 805, V.-C. K. See, too, *Read v. Blunt*, 5 Sim. 567, and compare *Atkinson v. Grey*, 1 Sim. & G. 577. See *ante*, p. 1038.

(*t*) *Jacques v. Chambers*, 2 Coll. 435; *Wright v. Warren*, 4 De G. & S. 367.

(*u*) *Lock v. Venables*, 27 Beav. 598. See, also, *Wright v. Tuckett*, 1 J. & H. 266.

(*x*) As in *Clive v. Clive*, Kay, 600, which turned on the special wording of the company's deed of settlement.

(*y*) *Wright v. Tuckett*, 1 J. & H. 266.

lations of profits. Payments of the first kind, whether called dividends or bonuses, or partly one and partly the other, are income, and belong to the tenant for life; but payments of the last kind are treated as capital, and ought to be invested (z).

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Where part of the profits accruing during the life of the tenant for life are capitalised by the company, he has no right to have the loss of income, which he thereby sustains, made good by the remainderman (a).

Loss of income
by tenant for
life.

Interest on a debt accrues *de die in diem*, and is apportionable irrespectively of the apportionment acts; but shares of profits are not apportionable except under those acts, and they only apply to payments becoming due at fixed and definite periods. If, therefore, a testator bequeaths debentures to one person for life, and afterwards to another, and dies shortly before the current interest on the debentures is payable, so much only of that interest as accrued after the death of the testator will belong to the tenant for life (b). But if there is a similar bequest of shares in a company, and the testator dies a few days before a dividend upon them is declared, the whole of such dividend belongs to the tenant for life (c); unless indeed the act, charter, or deed of settlement of the company fixes the precise days on which the dividends (if any) are to be paid, in

Apportionment
of interest and
dividends.

(z) Compare *Hollis v. Allan*, 1 Weekly N. 290, V.-C. K.; *Plumbe v. Nield*, 6 Jur. N. S. 529, V.-C. K.; *Price v. Anderson*, 15 Sim. 473; *Preston v. Melville*, 16 ib. 163; and *Barclay v. Wainwright*, 14 Ves. 66, in which the payments were held to be income; with *Ward v. Comb*, 7 Sim. 634; *Witts v. Steere*, 13 Ves. 363; *Paris v. Paris*, 10 Ves. 185; and *Brander v. Brander*, 4 Ves. 800, in which the payments were held to be capital. See, also, *Cuming v. Boswell*, 2 Jur. N. S. 1005, where the House of Lords held, that upon the true construction of a Scotch deed, bonuses belonged to an infant's estate, and not to the person who, on his death under 21, became entitled to the

stocks which yielded them. In *Maclaren v. Stainton*, 27 Beav. 460, the Master of the Rolls held that a bonus arising from money paid to a company under a compromise with one of its own shareholders was not payable to the specific legatee of his shares, but to his residuary legatee. This decision, however, was reversed on appeal; see 3 De G. F. & J. 202.

(a) See *Stroud v. Gwyer*, 28 Beav. 130.

(b) See *Rogers' Trust*, 1 Dr. & Sm. 338.

(c) *Maxwell's Trusts*, 1 Hem. & M. 610; *Bates v. Mackinley*, 31 Beav. 280; *Clive v. Clive*, Kay, 600.

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which case there is an apportionment (*d*). Similar principles are applicable to bequests of shares in partnerships (*e*).

Other circumstances being the same, the prices of shares in dividend-paying companies naturally rises as a dividend day approaches; in fact, the price includes a proportionate part of the accruing dividend; nevertheless, as between a tenant for life and a remainderman the price realised by a sale of shares is all treated as *corpus*, without reference to the time when a sale is made (*f*).

Liability of
executors for not
selling shares.

Where shares are bequeathed to executors upon trust for sale as soon as conveniently may be after the testator's death, they should sell them within a year after his death: and in a recent case where they were kept unsold for many years and the company was ultimately wound up, the estate of a deceased executor who survived the testator only thirteen months was held liable for the loss sustained by not having sold them within the year (*g*).

(*d*) See as to this qualification, *Maxwell's case*, 1 Hem. & M. 610; *Hartley v. Allen*, 4 Jur. N. S. 500, V.-C. K., and quære if it is well founded.

(*e*) *Ibbotson v. Elam*, L. R. 1 Eq. 188; *Johnston v. Moore*, 27 L. J.

Ch. 453.

(*f*) *Scholefield v. Redfern*, 2 Dr. & Sm. 182. See, also, *Freeman v. Whitbread*, L. R. 1 Eq. 266.

(*g*) *Grayburn v. Clarkson*, 2 Weekly N. 29, and see *ante*, p. 1059, note (*b*).

CHAPTER II.

OF BANKRUPTCY.

PRELIMINARY OBSERVATIONS.

PARTNERS and shareholders may become bankrupt, either individually or collectively ; and in some respects a division of the present branch of the law into two parts, relating, the one to the bankruptcy of an individual partner, and the other to the bankruptcy of a firm, would be as convenient as it would be simple. But the causes and consequences of the bankruptcy of an individual partner, and the causes and consequences of the bankruptcy of a firm of partners are in so many respects the same, that to consider them twice over, would lead to useless repetition. With a view to avoid this, it is proposed in the present chapter to treat of the bankruptcy of partners and partnerships under heads applicable to both, and to point out under each head those differences between the two which are of practical importance.

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Bankruptcy of
partners and
partnerships.

Shareholders in companies are like other individuals subject to the bankrupt laws ; but companies as distinguished from partnerships, are not. The statute, 7 & 8 Vict. c. 111, under which certain companies were capable of being adjudicated bankrupt, was repealed by the Companies act, 1862 (a) ; and limited companies which, under the repealed act, 19 & 20 Vict. c. 47, were wound up in bankruptcy, are now all wound up in chancery. Courts of bankruptcy have consequently, at present, no jurisdiction to wind up any company except in three cases, viz., 1. where the company was adjudicated bank-

Bankruptcy of
shareholders and
companies.

(a) The law under 7 & 8 Vict. c. 111, will be found in the first edit. of the present treatise.

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rupt under the repealed act 7 & 8 Vict. c. 111, and the assets of the company have not yet been fully administered; 2. where the company being limited was being wound up in bankruptcy under the repealed act 19 & 20 Vict. c. 47, and such winding up is not yet complete; 3. where under the Companies act, 1862, the Court of Chancery has (under § 81) remitted the winding up of a company to the Court of Bankruptcy having jurisdiction in the place where the company's registered office is situate. In this last case, the Court of Bankruptcy becomes the Court for winding up the company, and the proceedings in it are governed by those principles and rules which will be examined in the next chapter.

General law of
bankruptcy.

The present law of bankruptcy is based upon the Bankrupt law consolidation act, 1849, and the Bankruptcy act, 1861, and upon the rules and orders promulgated under their authority. In this treatise only so much of the law of bankruptcy as relates more particularly to partners is intended to be examined; the reader being referred to works on bankruptcy for further information on the subject.

SECTION I.—ADJUDICATIONS OF BANKRUPTCY AGAINST PARTNERS.

Under the present law a person may be adjudicated bankrupt either on his own petition (*b*), or on the petition of a creditor. If he petitions for an adjudication against himself, the filing of the petition is an act of bankruptcy (*c*). If a creditor petitions, he must, in order to obtain an adjudication against the debtor prove, first, that the debtor has committed an act of bankruptcy, and, secondly, that he is indebted to the petitioner to a given amount, and has no defence either at law or in equity to the petitioner's claim. Each of these points requires notice.

(*b*) 24 & 25 Vict. c. 134, § 86.

(*c*) *Ib.*

1. *As to acts of bankruptcy.*

In order to sustain a joint adjudication against two or more persons, it is necessary that some act of bankruptcy shall have been committed by each of them (*d*). But it is not requisite that they should all have committed an act of bankruptcy of the same kind. Thus, it will be sufficient if one has departed the realm with intent to defraud his creditors, and another has kept his house to avoid them, and a third has lain in gaol for debt, and so on (*e*).

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Rules as to joint
adjudications.

An act of bankruptcy committed by one partner will not amount to an act of bankruptcy on the part of his co-partners, unless it can be shown to have been, in point of fact, their act as well as his. The case of *Mills v. Bennett* (*f*) is a strong instance of this; there one of three bankers resided at the bank, and alone conducted the business of the firm, his co-partners residing at a distance. The resident and acting partner absented himself from the bank, shut it up, and stopped payment, and it was held that this was not sufficient to support a joint adjudication against the three partners.

Act of bank-
ruptcy com-
mitted by one
partner only.

In order to support a joint adjudication against all the members of a firm, each must have committed an act of bankruptcy during the continuance of a joint debt (*g*).

Time of commis-
sion of the act of
bankruptcy.

With respect to acts which are acts of bankruptcy a distinction is taken between traders and non-traders, many acts being made acts of bankruptcy when committed by traders, which are not so when committed by non-traders. This distinction was introduced by the Bankrupt act of 1861, and the reader is referred to 12 & 13 Vict. c. 106, § 65, for an enumeration of the persons who are liable to become bankrupt as traders, and to 12 & 13 Vict. c. 106, § 67 *et seq.*, as modified by 24 & 25 Vict. c. 134, § 71 *et seq.*, for an enumeration of what are acts of bankruptcy when committed by traders. The acts

Distinction be-
tween traders
and non traders.

(*d*) *Beasley v. Beasley*, 1 Atk. 97;
Mills v. Bennett, 2 M. & S. 556;
Allen v. Hartley, 4 Doug. 20; *Dut-*
ton v. Morrison, 17 Ves. 193; *Hogg*
v. Bridges, 8 Taunt. 200.

(*e*) Watson on Part. 248.

(*f*) 2 M. & S. 556. See, too, *Ex*
parte Mavor, 19 Ves. 543; *Ex*
parte Addison, 3 De G. & S. 580.

(*g*) See *Ex parte Bamford*, 15
Ves. 449; *Ex parte Dewdney*, ib.
495.

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Every member of
a trading part-
nership liable to
become bankrupt
as a trader.

Rule as to share-
holders.

which are acts of bankruptcy in the case of non-traders will be found in 24 & 25 Vict. c. 134, §. 70 *et seq.*

With reference to the distinction between traders and non-traders, it has been held that if a partnership is a trading partnership, every member of it, whether dormant or not, and every person who, by sharing profits or by holding himself out as a member, has rendered himself liable to third persons as if he were a partner, is a trader within the meaning of the bankrupt laws, and can be made bankrupt accordingly. It is not necessary that each partner should have bought and sold (*h*). A dormant partner may be either included in an adjudication against the firm (*i*), or be adjudged bankrupt on a petition against himself separately (*k*). The same, it is apprehended, is true of nominal partners (*l*).

With respect, however, to shareholders in companies, it is expressly enacted by 12 & 13 Vict. c. 106, § 65, that no member of or subscriber to any incorporated commercial or trading company, established by charter or act of Parliament, shall be deemed as such a trader liable to become bankrupt. And by virtue of other statutes, no member of the Bank of England, of the East India or English Linen Company, nor any adventurer in the Royal Fishing Trade or Guinea Company, nor any member of the London Assurance, or Royal Exchange, or South Sea Company, can be deemed a trader by virtue of his stock in those companies (*m*).

But unless a company is incorporated by charter or act of Parliament, so as to be brought within the general enactment above noticed, or unless it is made the subject of special enactment, every shareholder in it is, if *sui juris*, and if the company is itself a trading company, a trader within the meaning of the bankrupt laws. Thus a shareholder in a banking company has been made bankrupt as a trader simply

(*h*) *Parker v. Barker*, 1 Brod. & Bing. 9.

(*i*) As in *Ex parte Lodge and Fendall*, 1 Ves. J. 166.

(*k*) As in *Ex parte Hamper*, 17 Ves. 403.

(*l*) *Ex parte Murton*, 1 M. D. & D. 152, is an example of an adjudi-

cation against a firm of two, one of whom was only liable to third persons, in consequence of his having held himself out as a partner.

(*m*) See Cooke's Bank. Law, 79, ed. 8; Holmes and Griffith's Bank. Law, vol. 1, p. 90.

in respect of his shares in that company (*n*). It has been doubted whether shareholders in gas companies (*o*), and mining companies (*p*) are, merely as such, liable to be adjudicated bankrupt as traders.

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Both in the case of traders (*q*) and of non-traders (*r*), any fraudulent conveyance or transfer of property, whether real or personal, made with intent to defeat or delay creditors, amounts to an act of bankruptcy. The decisions on this very important subject, which are extremely numerous, and not a little conflicting, will be found collected in works on the bankrupt laws (*s*). In the present place, it will be sufficient to remind the reader that whilst a conveyance or assignment by a debtor of all, or substantially all (*t*), his property, either in satisfaction of (*u*) or as a security for (*x*) a debt previously contracted, is clearly an act of bankruptcy, although the conveyance or assignment is made *bonâ fide* and under pressure from the creditor (*y*); and although the creditor does not know that he is taking all his debtor's property (*z*). Moreover a conveyance or assignment of part only of a debtor's property is also an act of bankruptcy if made for the fraudulent purpose of preferring one creditor to another, *i. e.*, if made voluntarily and in contemplation of bankruptcy (*a*),

Fraudulent conveyances, &c.

(*n*) See *Ex parte Hall*, 3 Deac. 432 and 455, 6; *Ex parte Wyndham*, 1 M. D. & D. 146; *Smith v. Cannan*, 2 E. & B. 35. These cases remove the doubts expressed in *Ex parte Brundrett*, 3 Mon. & A. 50.

(*o*) *Ex parte Brown*, 2 M. D. & D. 758.

(*p*) *Ex parte Emery*, 4 De G. Mac. & G. 901; *Ex parte Atkinson*, 1 M. D. & D. 300.

(*q*) 12 & 13 Vict. c. 106, § 67.

(*r*) 24 & 25 Vict. c. 134, § 70.

(*s*) Griffiths and Holmes' Law of Bankruptcy, vol. i. pp. 106—135.

(*t*) *Ex parte Bailey*, 3 De G. Mac. & G. 534; *Ex parte Bland*, 6 ib. 757; *Stanger v. Wilkins*, 19 Beav. 626. Compare *Smith v. Timms*, 1 H. & C. 849, where it was held that a *bonâ fide* assignment by a trader of all his property, with a small

but not a colourable exception, was not an act of bankruptcy. See, also, *Young v. Waud*, 8 Ex. 221, where the assignment was upheld, though, if enforced, it would have stopped the assignor's trade.

(*u*) *Siebert v. Spooner*, 1 M. & W. 714.

(*x*) *Lindon v. Sharp*, 6 Man. & Gr. 895; *Oriental Banking Co. v. Coleman*, 3 Giff. 11; *Turner v. Hardcastle*, 11 C. B. N. S. 683.

(*y*) *Newton v. Chantler*, 7 East, 137; *Smith v. Cannan*, 2 E. & B. 35; *Leake v. Young*, 5 ib. 955; *Stanger v. Wilkins*, 19 Beav. 626.

(*z*) *Smith v. Cannan*, 2 E. & B. 35.

(*a*) See *Ex parte Simpson*, De Gex, 9; *Bevan v. Nunn*, 9 Bing. 107; *Harman v. Fishar*, Cowp. 117; *Devon v. Watts*, 1 Doug. 86;

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Sales, &c., for
present consi-
deration.

Fraudulent pre-
ference by
trustees.

and also if its necessary effect is to defeat and delay creditors (*b*).

On the other hand, it is held that a sale or mortgage by a debtor of all his property for a present advance, is not an act of bankruptcy (*c*), although the purchaser may be a creditor and may only pay the difference between the purchase-money and what is owing to him (*d*). So the *bonâ fide* giving security for present or future advances, is not an act of bankruptcy, although the security may comprise all the borrower's property (*e*), and cover an antecedent debt (*f*). Still less does a person commit an act of bankruptcy by *bonâ fide* conveying or assigning part of his property in payment of or as a security for a debt in respect of which he is being pressed (*g*); or by *bonâ fide* assigning part of his property upon trust for sale and payment of his debts (*h*).

Moreover, a debtor who is a trustee and who gives to his *cestui que trust*, or sets apart for him that which in equity is

and compare *Belcher v. Prittie*, 10 Bing. 408, and *Bannatyne v. Leader*, 10 Sim. 350, where a father preferred his son, but not fraudulently. The rule in the text applies to payments in money as well as to gifts or transfers of other things. See *Ex parte Simpson*, De Gex, 9; and see *Atkinson v. Brindall*, 2 Bing. N. C. 225, which is not altogether consistent with the last as regards the meaning of the phrase "contemplation of bankruptcy." See, as to this, *Aldred v. Constable*, 4 Q. B. 674.

(*b*) *Ex parte Wensley*, 1 De G. J. & Sm. 273; *Goodricke v. Taylor*, 2 Hem. & M. 380.

(*c*) *Baxter v. Pritchard*, 1 A. & E. 456; *Lee v. Hart*, 11 Ex. 880, and 10 Ex. 555. In each of these cases the seller contemplated bankruptcy, but the purchaser acted *bonâ fide*. See, as to mortgages, *Re Colemere*, L. R. 1 Ch. App. 128.

(*d*) *Bell v. Simpson*, 2 H. & N. 410; *Pennell v. Dawson*, 18 C. B. 355; *Pennell v. Reynolds*, 11 ib. N.

S. 709. Compare *Graham v. Chapman*, 12 C. B. 85, where the advance was itself included in the assignment.

(*e*) *Hutton v. Crutwell*, 1 E. & B. 15; *Bittlestone v. Cooke*, 6 E. & B. 296; *Harris v. Rickett*, 4 H. & N. 1. But see *Ex parte Sparrow*, 2 De G. Mac. & G. 907. A *bonâ fide* mortgage of part of a trader's property is clearly not an act of bankruptcy, see *Mather v. Fraser*, 2 K. & J. 536.

(*f*) *Pennell v. Reynolds*, 11 C. B. N. S. 709; *Shrubsole v. Sussams*, 16 ib. 452.

(*g*) *Crosby v. Crouch*, 11 East, 256; *Young v. Waud*, 8 Ex. 221; *Hale v. Allnutt*, 18 C. B. 505; *Strahan v. Barton*, 11 Ex. 647, where the debt had not become payable. See, too, *Belcher v. Prittie*, 10 Bing. 408; *Bannatyne v. Leader*, 10 Sim. 350; *Johnson v. Fesenmeyer*, 25 Beav. 88, and 3 De G. & J. 13.

(*h*) *Bannatyne v. Leader*, 10 Sim. 350; *Berney v. Davison*, 1 Brod. & B. 408; *Berney v. Vyner*, ib. 482.

his, does not commit an act of bankruptcy; and although the gift or setting apart may have been made in immediate contemplation of bankruptcy, it cannot be deemed a fraudulent preference (*i*).

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A conveyance by a debtor of all his property upon trust for his creditors, is clearly an act of bankruptcy (*k*); unless the conveyance falls within the 192nd section of the Bankruptcy act of 1861. But a conveyance upon trust for creditors can neither be relied on as an act of bankruptcy, nor be impeached, by any creditor who is bound by it (*l*); nor even by the assignees on behalf of other creditors, if the creditor on whose petition the adjudication is founded is himself bound by the conveyance (*m*). However, if a debtor makes an assignment which amounts to an act of bankruptcy, and afterwards petitions for adjudication against himself, his assignees are entitled to disregard the assignment if there are any creditors as to whom it is void (*n*); but not otherwise (*o*).

Creditors' deeds.

In order that a conveyance or assignment may be an act of bankruptcy, it must be made within twelve months before a petition for adjudication is presented (*p*). But although more than twelve months may have elapsed since an assignment was made, still if it is one which would have been an act of bankruptcy on the part of the assignor, it will be treated as a fraud upon those who were his creditors when the assignment was made; and if any of his then existing debts still remain unpaid, the assignment will be liable to be set aside (*q*).

Effect of lapse
of 12 months
after the con-
veyance.

(*i*) See *Edwards v. Glyn*, 2 E. & E. 29; *Sinclair v. Wilson*, 20 Beav. 324; *Gardner v. Rowe*, 2 Sim. & Stu. 346.

Ex parte Norton, ib. 504.

(*k*) *Simpson v. Sikes*, 6 M. & S. 295.

(*o*) *Ex parte Philpott*, De Gex, 346.

(*l*) Assenting to a creditor's deed is equivalent to executing it for the purpose of precluding a person from disputing it, *Ex parte Bayly*, Mon. & McAr. 438.

(*p*) 12 & 13 Vict. c. 106, § 88. If the conveyance is in trust for creditors, it is not an act of bankruptcy unless followed by a petition for adjudication within three months after its execution, ib. § 68.

(*m*) See *Tope v. Hockin*, 7 B. & C. 101, where the conveyance was not the act of bankruptcy relied on by the petitioning creditor.

(*q*) See as to this, *Hassel v. Simpson*, 1 Bro. C. C. 99, better reported in 1 Dougl. 89, note, under the name of *Hassells v. Simpson*; *Pulling v. Tucker*, 4 B. & A. 382; *Ex parte Sparrow*, 2 De G. Mac. & G. 907; *Ex parte Taylor*, 5 ib. 392;

(*n*) *Ex parte Jackson*, De G. 609;

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Conveyances, &c.,
by partners.

The foregoing doctrines are of considerable importance to partners, for an assignment by them of all their property upon trust for the payment of their debts, is an act of bankruptcy (*r*); unless protected by the 192nd section of the Bankruptcy act of 1861. Even if the assignment is intended to be executed by all the partners, but is in fact executed by one of them only, its execution by that one will be an act of bankruptcy on his part (*s*). Moreover, if all the partners execute the deed, and one of them only becomes bankrupt, the deed is avoided as to all of them (*t*). Again, if partners assign all their property to a person who undertakes to pay their debts, they thereby commit an act of bankruptcy (*u*). So, if partners have resolved to stop payment and they give cheques to particular creditors without being requested by them to do so, that amounts to a fraudulent preference and an act of bankruptcy on the part of the firm (*x*).

Conveyance by
one partner in
trust for credi-
tors of firm.

But a conveyance by one partner of all his separate property to a trustee, upon trust for sale and payment of the debts of the firm, is not an act of bankruptcy if made *bonâ fide* for the purpose of relieving the firm from its difficulties, and of enabling it to carry on its business, and not for the purpose of defrauding the separate creditors of the assignor (*y*). And it is apprehended that a conveyance by a firm of all its joint estate would not be an act of bankruptcy if the separate estates of the partners were substantial.

Conveyances
from one partner
to another.

An ordinary conveyance or assignment by one partner to another is not (with reference to the present subject) distinguishable from any other conveyance or assignment. But as each partner has a lien on the partnership property for what is due from the firm to him as a partner, it has been held that a *bonâ*

Oswald v. Thompson, 2 Ex. 215; & A. 434.

Ex parte Thomas, De G. 612; *Ex parte Jackson*, ib. 609.

(*r*) *Dutton v. Morrison*, 17 Ves. 193; *Bowker v. Burdekin*, 11 M. & W. 128; *Ex parte Jackson*, De G. 609.

(*s*) See *Bowker v. Burdekin*, 11 M. & W. 128.

(*t*) See *Ex parte Addison*, 3 Mon.

(*u*) *Ex parte Zwiichenbart*, 3 M. D. & D. 671. See, too, *Turquand v. Vanderplank*, 10 M. & W. 180.

(*x*) *Ex parte Simpson*, De Gex, 9; *Bevan v. Nunn*, 9 Bing. 107.

(*y*) *Abbott v. Burbage*, 2 Bing. N. C. 444; and see *Berney v. Davison*, 1 Brod. & B. 408, and *Berney v. Vyner*, ib. 482.

de assignment by one partner of all his share and interest in the partnership assets to his co-partner, upon trust, first, to pay the partnership debts, secondly, to retain what is due to himself from the firm, and thirdly, to divide the surplus, does not constitute an act of bankruptcy on the part of the assignor, although he may have had little other property than that comprised in the assignment (z). Such an assignment does not, in fact, do more than enable the assignee to work out the lien which he had previously to and independently of the assignment.

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2. *The petitioning creditor's debt.*

The petitioning creditor may be an ordinary individual, or a company empowered to sue and be sued by a public officer (a), or a corporation (b). But the better opinion seems to be that an official manager of a company being wound up under the Winding-up acts of 1848-9, was not entitled to obtain an adjudication of bankruptcy against a shareholder in respect of calls made in the winding up (c). But a company being wound up under the Companies act, 1862, could probably obtain an adjudication against one of its own shareholders in respect of such calls (d). If a single individual petitions, the debt in respect of which he petitions must be owing to him solely, and not to him and others jointly (e). When, however, a firm petitions, the petition need only be signed by one of the partners (f).

Who may petition.

The amount of the debt due to the petitioning creditor must be as follows: if there is only one petitioning creditor, or if, being more than one, they are partners, the debt must be 50*l.*,

Amount of petitioning creditor's debt.

(z) See *Payne v. Hornby*, 25 Beav. 280, where the assignor was a surviving partner, and the assignee the executor of his deceased partner.

(a) 24 & 25 Vict. c. 134, § 92. As to the old law, see *Guthrie v. Fisk*, 3 B. & C. 178.

(b) *Ex parte Collins*, De Gex, 381; *Ex parte Sneyds*, 1 Moll. 261.

(c) *Williams v. Harding*, L. R. 1 Ho. Lo. 9.

(d) See 25 & 26 Vict. c. 89, §§ 75, 95; *Ex parte Hall*, Mon. & Ch. 365.

(e) *Buckland v. Newsame*, 1 Taunt. 477.

(f) See Rules and Orders in Bankruptcy, No. 21.

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at least; if there are two petitioning creditors (not being partners) their debts must amount together to 70*l.*, at least; if there are three or more petitioning creditors (not being partners), their debts must amount together to 100*l.*, at least (*g*). If two firms petition, and the debts owing to them amount together to 70*l.*, that is sufficient (*h*). A creditor who holds a promissory note for 50*l.* may petition, although he did not give 50*l.* for it (*i*). But in computing the amount of the petitioning creditor's debt, the value of any securities he may have for it must be deducted (*k*).

Nature of his
debt.

The petitioning creditor's debt must be a debt, in the strict sense of the word, and not a claim for unliquidated damages. Therefore a covenant that the debts of a firm do not exceed a certain sum, will not, though broken, support a petition by the covenantee against the covenantor (*l*). Again, the petitioning creditor's debt must be one enforceable by action, and one in respect of which the creditor would not be restrained in equity from suing at law (*m*). This doctrine is of great importance in cases of partnership.

Petition by one
partner against
another.

A partner who is a creditor of his co-partner, and who might sue him at law, without being restrained from so doing by a court of equity, may petition for, and obtain an adjudication of bankruptcy against his co-partner (*n*). This is clear, from many cases, of which *Ex parte Notley* (*o*) may be taken as a type. There the petitioning creditor had lent the bankrupt a sum of money upon the terms of receiving interest at 5*l.* per cent., and a share in the net profits of the bankrupt's business, so long as the principal remained unpaid: repayment of the principal and interest was secured by a bond and a judgment. The principal so lent, together with some arrears of interest thereon, constituted the petitioning creditor's debt, and it was held sufficient; for although the borrower and the lender were

Ex parte
Notley.

(*g*) 24 & 25 Vict. c. 134, § 89.

100; and see *Hope v. Meek*, 10 Ex.

(*h*) *Doe v. Ingilby*, 14 M. & W.

842.

91.

(*i*) *Ex parte Lee*, 1 P. W. 781.

(*n*) See, in addition to the cases noticed in the text, *Windham v. Paterson*, 2 Rose, 466; *Ex parte Nokes*, and *Ex parte Maberley*, 1 Mont. on Part. note N. p. 62.

(*k*) 24 & 25 Vict. c. 134, § 97.

(*l*) *Ex parte Broadhurst*, 2 De G. Mac. & G. 953.

(*m*) *Ex parte Page*, 1 Gl. & Jam.

(*o*) 1 Mon. & Ayr. 46.

liable to strangers as if they were partners, the debt in question had nothing to do with the partnership accounts, and might have been recovered by action at law. Again, in *Ex parte Richardson* (p), two brothers, *Henry* and *William*, had been partners, and had dissolved partnership. On the dissolution, the accounts were taken, and the firm was found debtor to *William* in 1000*l.* and upwards. *Henry* continued the business, without paying off what was due to his brother, and borrowed from him from time to time other monies, which were placed to *William's* credit in his account with the late firm. *William* petitioned for an adjudication against *Henry*, and was held to have a sufficient debt (q).

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Ex parte Richardson.

Upon the same principle, a company may petition for adjudication against one of its shareholders, if it is in a position to sue him at law, and if it would not be restrained from suing him by a court of equity (r). So the trustee of a friendly society may obtain an adjudication against a member, in respect of a debt owing by the member to the society, and for which the trustee can sue at law, and for which he would be permitted to sue by a court of equity (s).

Petition by company against shareholder.

But although one partner may, at law, be in a position to sue his co-partner for the recovery of a debt, such debt will not be sufficient to support a petition for adjudication presented by the creditor partner against the debtor partner, if a court of equity would, at the instance of the latter, restrain an action for the recovery of such debt. This is well shown by the case of *Ex parte Gray* (t), where the petitioner was not the creditor partner himself, but his trustee. *Hodges* and *Gray* were partners. *Hodges* had brought in 1000*l.* as his share of the partnership capital, and had lent *Gray* 1000*l.*, which he brought in as his share. *Gray* had covenanted with *Hodges* to repay him this sum with interest; and, as a further security, *Gray* had executed a mortgage to a trustee for *Hodges*, and had

Petition by one partner against another continued.

Ex parte Gray.

(p) 3 D. & Ch. 244.

(q) In this case there was a sufficient debt irrespectively of the balance found due to *William* on the dissolution, but the brothers treated the loans made subsequently as if made to the late firm.

(r) See *Ex parte Hall*, Mon. & Ch. 365. As to petitioning for calls made in winding up, see *Williams v. Harding*, L. R. 1 Ho. Lo. 9.

(s) *Hope v. Meek*, 10 Ex. 829.

(t) 2 Mon. & A. 283.

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covenanted with the trustee to pay him the same sum, with interest. *Hodges* had filed a bill for a dissolution of partnership, and for an account. His trustee then petitioned for, and obtained an adjudication of bankruptcy against *Gray*; but the adjudication was annulled, on the ground that *Hodges*, having filed a bill for an account, would not have been allowed to sue for the 1000*l.* at law, and that his trustee was in no better position than himself.

The petitioning creditor's debt must have been incurred before or during the trading ;

As regards petitions against traders as such, the petitioning creditor's debt must have been incurred by the debtor, whilst he was in trade, or before he began to trade (*u*), but not after he ceased to trade (*x*). However, if the debt was contracted by the trader before he ceased to trade, it will be sufficient, although it may have been merged in a higher security since the trading ceased (*y*).

and before the act of bankruptcy ;

Again, the petitioning creditor's debt must have accrued before the commission of the act of bankruptcy relied upon (*z*). But if a debtor makes, accepts, or endorses a promissory note, or bill of exchange, and then commits an act of bankruptcy, a person to whom such note or bill is afterwards endorsed for value, may petition in respect of it (*a*). Moreover, it is not necessary that the debt shall have been actually due when the act of bankruptcy was committed ; for a person who has given credit to a debtor upon valuable consideration for any sum payable at a certain time, which shall not have arrived when he committed an act of bankruptcy, may, nevertheless, petition against him (*b*).

and in case of a non-trader, after 6th August, 1861.

Where the debtor is a non-trader, the petitioning creditor's debt must have been contracted after the 6th of August, 1861, unless the debtor is a prisoner against whom the creditor could have obtained a vesting order under the insolvent acts if they had not been repealed (*c*). Upon this section it has been decided by the House of Lords, that calls made on a shareholder under the Winding-up acts of 1848-9, after the 6th of

(*u*) *Bailie v. Grant*, 9 Bing. 121.

(*x*) *Re Dolby*, Mon. & C. 636.

(*y*) *Re Griffiths*, 3 De G. Mac. & G. 174; *Bryant v. Withers*, 2 M. & S. 123.

(*z*) *Moss v. Smith*, 1 Camp. 489.

(*a*) See *Glaister v. Hewer*, 7 T. R. 498.

(*b*) 12 & 13 Vict. c. 106, § 91.

(*c*) 24 & 25 Vict. c. 134, § 89.

August, 1861, were not debts contracted by him before that date, although he had become a shareholder previously thereto (*d*). But a call made under the winding-up provisions of the Companies' act, 1862, is expressly declared to be a debt accruing when the call is made, and the decision referred to cannot therefore apply to shareholders to whom that act applies (*e*). Bk. IV. Chap. 2
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Even where a person is a creditor to a sufficient amount, where his debt has accrued at the proper time, and where the debtor has committed an act of bankruptcy, there may be circumstances which preclude the creditor from obtaining adjudication against his debtor. For example, the creditor may be an alien enemy, as where, though a British subject, he is residing and trading in an enemy's country without license (*f*); or, the creditor may rely on an act of bankruptcy, to which he has himself been privy, as where the debtor has assigned all his property in trust for his creditors, and the petitioner is a creditor who is bound by such assignment (*g*); in such cases as these, an adjudication at his instance cannot be supported. Circumstances
which preclude
a creditor from
petitioning.

In connection with this subject, it may be observed that, although one partner may have obtained an adjudication of bankruptcy against his co-partner (*h*), still, if it appears that the real object of the petitioner was to dissolve the partnership, and that an adjudication of bankruptcy is not required for any other purpose, the adjudication will be annulled (*i*). So it will if it has been obtained on the petition of a creditor acting at the instigation of one of the partners; and whether the adjudication is against the whole firm, or one only of its members, is immaterial (*k*). Improper peti-
tions by one
partner against
his co-partner.

(*d*) *Williams v. Harding*, L. R. 1 D. 678; *Ex parte Phipps*, 3 ib. 505. Ho. Lo. 9. These cases correct *Ex parte Parkes*,

(*e*) *Ex parte Canwell*, 33 L. J. 3 Deac. 31, in which it was said Bank. 26. that if the petitioner's sole object was not to procure a dissolution, an adjudication obtained by him could not be annulled.

(*f*) *McConnell v. Hector*, 3 Bos. & P. 113.

(*g*) See *Ex parte Payne*, De Gex, 534.

(*h*) *Ante*, 1082.

(*i*) *Ex parte Christie*, Mont. & Bl. 314; *Ex parte Browne*, 1 Rose, 151; *Ex parte Johnson*, 2 M. D. & 214, 215; *Ex parte Gallimore*, ib.

(*k*) See, in addition to the cases just cited, *Ex parte Hall*, 3 Deac. 405; *Ex parte Bourne*, 2 Gl. & J. 137; *Ex parte Harcourt*, 2 Rose, 214, 215; *Ex parte Gallimore*, ib.

3. *Of joint and separate adjudications.*Bk. IV. Chap. 2.
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support a sepa-
rate adjudica-
tion.

It has long been decided that a debt owing by one partner only will not support a joint adjudication against him and his co-partners (*l*); but, that a debt owing by one person jointly with others, is sufficient to support an adjudication against that one alone (*m*); and that consequently, a creditor of an ordinary firm can obtain an adjudication of bankruptcy against one only of the members of that firm, although that one may not be separately indebted to him.

Rule in the case
of companies.

This doctrine, however, does not apply to companies which are incorporated, or which, without being incorporated, are empowered to sue and be sued by public officers (*n*), for it has been held, that a creditor of such a company *must* obtain judgment against the public officer before proceeding against individual shareholders (*o*).

Partners who
may be adjudi-
cated bankrupt.

Partners who are dormant or who are nominal merely, may be adjudicated bankrupt (*p*). But there seems to be a difficulty in supporting a joint adjudication against several partners, one of whom is dormant and is only entitled to a share of the profits; for in such a case there is no joint property to administer (*q*). Where all the partners save one are dead, the survivor can be made bankrupt; and although all the joint property may in one sense be vested in him by survivorship, a petition filed against him alone before his co-partners died, will not be superseded in favour of a petition filed against him alone since their death (*r*).

424. In *Ex parte Nash*, 12 Jur. 494, *Ex parte Parkes*, 3 Deac. 31, and *Ex parte Wilbran*, alias *Wilbeam*, 5 Madd. 1, and *Buck*, 459, the Court refused to supersede the commission, not being satisfied that it had been obtained with an improper object. See, also, *Ex parte Upfill*, 1 Weekly N. 206.

(*l*) See *Ex parte Clarke*, 1 D. & C. 544.

(*m*) *Crispe v. Perrit*, Willes, 467, and 1 Atk. 133, and *Ex parte Caruthers*, and *Ex parte Upton*, there

cited; *Ex parte Lavender*, 18 Ves. 18.

(*n*) *Davison v. Farmer*, 6 Ex. 242, overruling *Ex parte Wood*, 1 M. D. & D. 92.

(*o*) *Ibid.*, and *Stewart v. Greaves*, 10 M. & W. 711.

(*p*) See *Ex parte Mathews*, 3 V. & B. 125; *Ex parte Hamper*, 17 Ves. 403. Dormant partners may be omitted, see *Ex parte Benfield*, 5 Ves. 424, and *infra*.

(*q*) See *Ex parte Hamper*, 17 Ves. 403.

(*r*) *Ex parte Smith*, 5 Ves. 295.

A deceased person cannot of course be adjudicated bankrupt; but an adjudication against one or more persons may be proceeded with, notwithstanding he or they may subsequently die (s); and if, after the filing of a petition for a joint adjudication against several persons, one of them dies, an adjudication may be made against the survivors; or if an adjudication has already been made against them and the deceased, it will be amended (t).

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Effect of death of
a partner.

Formerly it was held that there could not be a joint adjudication against some only of the members of a firm; so that, for example, if a partnership consisted of six ostensible partners (u), there could not be a joint adjudication against any two, three, four, or five of them (x). One consequence of this was, that if one of the partners was an infant or lunatic (in which case he could not be made bankrupt), a joint adjudication could not be supported (y). But now, by 12 & 13 Vict. c. 106, § 97, any creditor whose debt is sufficient to petition for adjudication of bankruptcy against all the partners of a firm, may petition for adjudication against any one or more of them, and such petition is valid, although it does not include all the partners; and in every petition for adjudication against two or more persons, the Court may dismiss the same as to one or more of them, without affecting its validity as to the others (z). This provision, it will be observed, does not enable a person who is a creditor of some or one only of the members of a firm to obtain adjudication against the whole firm; nor can he do so, for *ex hypothesi* all the members of the firm are not his debtors (a).

Joint adjudica-
tion against some
of the partners
only.

(s) 12 & 13 Vict. c. 106, § 116. See, as to the law formerly, *Ex parte Norris*, 3 Deac. 643.

(t) See *Ex parte Hall*, De Gex, 332.

(u) Dormant partners might be omitted, *Ex parte Benfield*, 5 Ves. 424.

(x) *Allen v. Downes*, Willes, 474, note; and fully stated in Watson on Part. 244; *Allen v. Hartley*, 4 Dougl. 20.

(y) *Ex parte Lees*, 1 Deac. 705;

Ex parte Henderson, 4 Ves. 163; *Ex parte Layton*, 6 ib. 434; *Streatfield v. Halliday*, 3 T. R. 779. See, as to superseding them, *Ex parte Addison*, 3 Deac. 54; *Ex parte Watson*, 16 Ves. 265.

(z) See *Ex parte Watson*, 3 Deac. 277.

(a) See *Ex parte Clarke*, 1 D. & Ch. 544, which shows that a joint adjudication obtained on the petition of a separate creditor is wholly void.

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Cases of two
firms with com-
mon partners.

Where there are two distinct firms, a major and a minor firm, a creditor of the latter only, may, and always might, obtain a joint adjudication against all the persons who compose it; although their co-partners in the major firm cannot be included in the same adjudication (*b*). If, however, the major firm is adjudicated bankrupt, this involves the bankruptcy of the minor firm; and its creditors can, therefore, obtain payment of their debts under the adjudication against the major firm, although they could not have procured such adjudication (*c*).

Concurrent ad-
judications.

Formerly it was the practice for a creditor of a firm of several partners to take out separate commissions against each partner, as well as a joint commission against the whole firm; the object being to distribute the assets of the firm under the joint commission, and the separate assets of each partner under the separate commission issued against him (*d*). The modern practice, however, is different; for now, under a joint adjudication against a firm, not only are the assets of the firm distributed amongst its joint creditors, but the separate assets of each partner are also distributed amongst his own separate creditors (*e*). Under a joint adjudication, therefore, everything can be done as fully and effectually as under separate adjudications against all the members, and more can be done than under separate adjudications against some only of them. For these, amongst other reasons, a joint creditor seldom or never now thinks of petitioning for separate adjudications against all the partners. If he is desirous of making them all bankrupt, he petitions for a joint adjudication against the firm (*f*).

(*b*) *Ex parte Chambers*, 2 Mont. & A. 440, and *Bernasconi v. Farebrother*, ib. 441; see ib. 472.

(*c*) *Ex parte Worthington*, 3 Madd. 26.

(*d*) See Cooke's Bank. Law, 13 & 14, 8th ed. *Qu.* how this could be done consistently with the doctrine that a person once made bankrupt cannot, until he has obtained his certificate, be made bankrupt again? See, on this subject, 1

Mont. Part. notes K. and 2 B. pp. 44 and 100 of the appendix.

(*e*) The bankruptcy of a firm is in fact the bankruptcy of the individuals composing it, see *Graham v. Mulcaster*, 4 Bing. 115; *Stonehouse v. De Silva*, 3 Camp. 399.

(*f*) In *Ex parte Gardner*, 1 V. & B. 77, a creditor of a firm obtained separate adjudications against all the partners, but Lord Eldon evi-

It used to be considered that a person who had been once made bankrupt was incapable of being made bankrupt again unless he had obtained a certificate ; and that a second adjudication against him was utterly void (*g*). But the correctness of this view has been recently questioned, and denied by very high authority ; and it has been decided that the assignees under a second adjudication against an uncertificated bankrupt are entitled to recover property acquired by him since the first adjudication (*h*). Whichever view, however, is correct, it is obvious that, inasmuch as all the property of a bankrupt, until he has obtained his order of discharge, may be acquired by his assignees for the benefit of his creditors, a second adjudication against him is generally of little if any use. But this observation does not apply to the case of a partner ; for in general it is much more expeditious, cheap, and otherwise advantageous to wind up the affairs of partners under a joint adjudication against the firm, than under one or more separate adjudications against the members thereof individually. Consequently joint adjudications are regarded with more favour than separate ones ; and if a separate adjudication has been obtained against a partner, and a joint adjudication is afterwards obtained against the firm to which he belongs, the Courts will give effect to the latter adjudication, and annul the former, unless injustice will result from so doing. This course was first adopted by Lord Thurlow, in *Ex parte Hardcastle* (*i*), and the advantages of a more extensive adjudication over a less extensive one are so great, that it has now become quite a matter of course to annul

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Several adjudications against same person.

Joint adjudication after a separate one.

dently disapproved of that course. But see *Ex parte Duncan*, 1 Mon. D. & D. 149, and *Ex parte Burdekin*, ib. 256.

(*g*) *Ex parte Crew*, 16 Ves. 237 ; *Nelson v. Charrell*, 7 Bing. 663 ; *Phillips v. Hopwood*, 1 B. & Ad. 619 ; *Martin v. O'Hara*, Cowp. 823 ; *Ex parte Proudfoot*, 1 Atk. 251 ; *Ex parte Brown*, and *Ex parte Munton*, 1 V. & B. 60 ; *Till v. Wilson*, 7 B. & C. 690 ; *Fowler v. Coster*, 10 ib. 427 ; and see *Ex parte Chambers*, 3 M. & A. 294, and a note to

Ex parte Welsh, Mont. 280, where all the cases on the subject will be found collected. See, too, 1 Mont. Part. note K. p. 44, and 2 B. p. 100. If there are two commissions, and the first has never been acted on, the second is valid ; see *Warner v. Barber*, 8 Taunt. 176.

(*h*) *Morgan v. Knight*, 15 C. B. N. S. 669, where, however, the assignees under the first adjudication made no claim.

(*i*) 1 Cox, 397.

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separate adjudications against individual partners where a valid joint adjudication against the firm has been also obtained (*k*). But if the joint adjudication is invalid, *e. g.*, owing to the insufficiency of the petitioning creditor's debt, or of the evidence showing acts of bankruptcy by all the persons included in it, or if there is no joint estate worth mentioning, a prior separate adjudication will not be annulled (*l*). Moreover, although, as a rule, a separate adjudication will be annulled in order that a subsequent joint adjudication may be proceeded with, this is only because, as a rule, it is most to the advantage of creditors that this course should be taken. The Courts will, in their discretion, support whichever of several adjudications will allow most complete justice to be done, and annul all the others (*m*); and instances are not wanting in which joint adjudications have been annulled, and separate ones allowed to proceed (*n*).

Bankrupt firms
with common
partners.

Again, where two firms having a common partner are both adjudged bankrupt, in which case the common partner is adjudged bankrupt twice over, the latest of the adjudications will be superseded as to him (*o*). It was at one time doubted whether this could be done (*p*); but that doubt has long been removed, and there is a case in which an unwilling purchaser was compelled to take an estate, the title to which depended on this very point (*q*).

Supporting one
adjudication by
proceedings in
another.

Where a separate adjudication has been made, and a joint adjudication is afterwards petitioned for, but there is no

(*k*) *Ex parte Pemberton*, 1 M. D. & D. 190. The cases in which joint commissions have been upheld, and separate ones superseded, are very numerous. The following are those most usually referred to:—*Ex parte Brown*, 1 V. & B. 60; *Ex parte Rawson*, 1 V. & B. 160; S. C. *Ex parte Mason*, 2 Rose, 160; *Ex parte Smith*, 1 Gl. & J. 256; *Ex parte Patchelor*, 2 Rose, 26; *Ex parte Burdekin*, 2 M. D. & D. 187; *Ex parte Digby*, 1 Deac. 347.

(*l*) *Ex parte Roberts*, 1 Madd. 72; *Ex parte Beale*, 2 Dru. & War.

566; *Ex parte Rennick*, 12 Jur. 996.

(*m*) *Ex parte Crew*, 16 Ves. 237; *Ex parte Rawson*, 1 V. & B. 163; *Ex parte Cridland*, 2 Rose, 167.

(*n*) *Ex parte Rowlandson*, 1 Rose, 89; and see *Ex parte Cutten*, Buck, 68; *Ex parte Hamper*, 17 Ves. 403. See, too, the last note but one.

(*o*) *Ex parte Coleman*, Mon. & McAr. 15; *Ex parte Bygrave*, 2 Gl. & Jam. 391.

(*p*) *Ex parte Burlton*, 2 Gl. & Jam. 344.

(*q*) *Burlton v. Wall*, Tam. 113.

sufficient evidence to support it without having recourse to what has been proved in the matter of the separate adjudication, use may be made of what has been so proved, and the evidence given in support of the separate adjudication will, if necessary, be ordered to be produced in order that a joint adjudication may be made (*r*).

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Adjudications of bankruptcy will be superseded and annulled, not only in order that effect may be given to a joint adjudication where a separate one already exists, but in other cases, for which the reader is referred to treatises on the law of bankruptcy (*s*).

Causes for which
an adjudication
may be annulled.

The effect of annulling an adjudication depends upon the cause for which it is annulled. If it is annulled upon the ground that it ought never to have been made, then, speaking generally, everything done under it is invalid; but if it is annulled upon some other ground, then the annulment has no retrospective effect (*t*). This distinction has not always been kept in view; and it was at one time commonly supposed that the effect of annulling an adjudication was in all cases to destroy the validity of everything done under it (*u*); but the error of this opinion was pointed out in *Smallcombe v. Olivier* (*t*), which is the leading case upon the subject. Even where the annulment has a retrospective effect, certain transactions done under the adjudication are expressly rendered valid by statute (*x*); and when a separate adjudication against one partner is annulled in favour of a joint adjudication against him and his co-partners, it is usually expressly declared in the annulling order (*y*) that all sales under the first

Effect of annulling an adjudication.

(*r*) *Ex parte Sharp*, 2 Mon. D. & D. 350; *Ex parte Harrison*, 2 Gl. & J. 135. *Ex parte Burdekin*, 1 Deac. 57, is, however, opposed to these.

204; *Gould v. Shoyer*, 6 Bing. 738.

(*s*) As to annulling where an adjudication has been obtained *malâ fide*, to dissolve a partnership, see *ante*, p. 1085.

(*x*) See as to impeaching sales, 12 & 13 Vict. c. 106, § 131; and as to recovering property or debts delivered or paid to the assignees under the annulled adjudication, *ib.* § 155; and as to suing for debts proved under it, *ib.* § 182.

(*t*) *Smallcombe v. Olivier*, 13 M. & W. 77; and see Buck. 260, in the note.

(*y*) See the precedents in *Ex parte Mason*, or *Rawson*, 1 Rose, 428; *Re Colbeck*, Buck, 54; *Ex parte Digby*, 1 Deac. 347; *Ex parte Ravensworth*, 4 *ib.* 172.

(*u*) See *Ex parte Milner*, 19 Ves.

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bankruptcy shall be confirmed and carried into execution by the assignees under the second; that the proofs of debts under the first shall be considered as if they had been made under the second (z); that all creditors shall be admitted to prove under the second bankruptcy; that distinct accounts of the joint and separate estates shall be kept in the usual way; that the assignees in the first bankruptcy shall account to those in the second for assets possessed under the first, and shall allow actions to be brought in their names by the assignees under the second bankruptcy.

Costs of annulling.

The costs of annulling a separate, in order to give effect to a joint, adjudication, are usually borne by the joint estate (a).

Annuling after certificate.

The fact that the bankrupt has obtained his order of discharge under an adjudication does not prevent such adjudication from being annulled (b).

Staying proceedings instead of annulling.

Where, in consequence of what has been done under an adjudication, it is inexpedient to annul it, the practice is not to annul, but to impound it, and to stay all further proceedings under it (c).

Legality of annulling one adjudication to give effect to another.

It only remains to be added, with reference to the present subject, that the power to annul a prior adjudication, and to give effect to a subsequent one, is not so clearly established at law as it is in bankruptcy and in equity (d). Hence, an injunction to restrain the production at law of evidence to show the existence of the annulled bankruptcy, will, if necessary, be granted (e). However, in one case where an action was brought

(z) See *Ex parte Bateson*, 1 M. D. & D. 500.

(a) *Ex parte Duncan*, 1 M. D. & D. 149; *Ex parte Burdekin*, ib. 156; *Ex parte Sharp*, 2 ib. 531; *Ex parte Peat*, ib. 788. See, too, *Ex parte Morris*, 10 Jur. 1018, where an invalid adjudication against three persons was annulled to give effect to a subsequent adjudication against two of them.

(b) *Ex parte Cutten*, Buck, 60; *Ex parte Rowlandson*, 1 Rose, 89; *Ex parte Gillam*, 2 Cox, 193; *Ex parte Poole*, ib. 227.

(c) See *Ex parte Tobin*, 1 V. &

B. 308; *Ex parte Rowlandson*, 1 Rose, 416; *Re Colbeck*, Buck, 54; *Ex parte Digby*, 1 Deac. 347; *Ex parte Ravenscroft*, 4 Deac. 172; *Ex parte Lister*, 3 ib. 516.

(d) *Butt v. Bilke*, 4 Price, 241, and 2 Rose, 171, note, and see Lord Eldon's observations in *Ex parte Lees*, 16 Ves. 467, and in *Ex parte Cridland*, 2 Rose, 167; and see 1 Mont. Part. 51 and 52, in notes.

(e) *Ex parte Thompson*, 1 Rose, 285. The fact that an adjudication has been annulled, could now, it is apprehended, be set up as an *equitable defence* at law.

by assignees, and a verdict was obtained by them, but a petition for superseding their commission was pending, the Court of King's Bench, on the application of the defendant, stayed execution, and ordered that the amount recovered should be paid into Court (*f*).

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Where separate adjudications are obtained against all the members of a firm, the separate adjudications may be consolidated and prosecuted as if there were a joint adjudication (*g*); and if there is also a joint adjudication, an order may be obtained consolidating them all, and staying further proceedings under the separate adjudications (*h*). So, if two firms are separately adjudged bankrupt, the two adjudications will be consolidated and prosecuted as one, if so to do will be for the benefit of the creditors of both firms (*i*).

Consolidation of
separate adjudications.

By the Bankruptcy act of 1861, the Court in London is empowered to order any petition to be presented in any district, and to consolidate, impound, and transfer petitions and other proceedings under them (*k*).

With a view to save expense and delay in case several adjudications are obtained against several partners, it is enacted by the 12 & 13 Vict. c. 106, § 98, "That after a fiat issued or a petition for adjudication of bankruptcy filed against, or by, one or more member or members of a firm, any petition or petitions for adjudication of bankruptcy against or by any other member or members of such firm shall be filed and prosecuted in the court in which the first fiat or petition was prosecuted; and immediately after the adjudication under such other petition or petitions, all the estate, real and personal, of such bankrupt or bankrupts shall vest in the official assignee (if any) under the first fiat or petition, and thereafter all separate proceedings under such petition or petitions shall be stayed, and such petition or petitions shall, without affecting the validity of the first fiat or petition, be annexed to and form part of the

Prosecution of
several adjudications before
the same commissioner.

(*f*) *Hodgkinson v. Travers*, 1 B. & C. 257.

(*g*) *Re Gowar*, 1 M. D. & D. 1.

(*h*) *Ex parte Lister*, Mon. & Ch. 260.

(*i*) See in *Harris v. Farwell*, 13 Beav. 403; *Ex parte Grylls*, 12

Jur. 171, a firm trading in one district was adjudicated bankrupt in another where one of the partners resided. The proceedings were removed from the latter to the former district.

(*k*) 24 & 25 Vict. c. 134, § 88.

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same: Provided that the senior commissioner may direct that such other petition or petitions shall be filed and prosecuted in any other court, or be proceeded in either separately or in conjunction with the first fiat or petition; and such direction shall be made by a memorandum to that effect endorsed on such petition or petitions, and under the hand of the senior commissioner." Under this section, if there is a separate adjudication against one partner, and a joint adjudication against his co-partners, either with him or without him, the joint adjudication will be ordered to be prosecuted with the separate adjudication (*l*).

4. Choice of assignees.

Separate creditors cannot vote in the choice of assignees under a joint adjudication (*m*); but joint creditors are entitled to vote in the choice of assignees under a separate adjudication (*n*).

Effect of annulling adjudication.

If a separate is annulled in favour of a joint adjudication, the separate creditors lose their right to vote in the choice of assignees; but this has been decided not to be a sufficient reason for preserving the first adjudication (*o*).

Appointment of inspectors to protect the separate creditors.

Where there is a joint adjudication, and assignees have been chosen by the joint creditors (*p*), and the separate creditors of

(*l*) See *Ex parte Green*, 3 De G. & J. 50; *Ex parte Haines*, ib. 58; *Re Simmons*, 2 M. D. & D. 603. See, also, the last note.

(*m*) *Ex parte Parr*, 18 Ves. 65; *Ex parte Jepson*, 19 Ves. 224; *Ex parte Hamer*, 1 Rose, 321. These cases were all decided long before the passing of the present Bankrupt act, but they are generally understood to be in accordance with the present state of the law.

(*n*) 12 & 13 Vict. c. 106, § 140. This was formerly otherwise as to all joint creditors except the petitioning creditor. See *Ex parte Hall*, 9 Ves. 349; *Ex parte Hubbard*, 13 Ves. 424; *Ex parte Longman*, 18 Ves. 71; *Ex parte Simpson*, 2

Rose, 337; *Ex parte Laycock*, 1 ib. 33. Corporations vote by attorney appointed under their common seal, *Ex parte Bank of England*, 1 Swanst.

10. Companies empowered to sue by public officers vote by them or by attorneys appointed by them, *Ex parte Ackroyd*, 1 M. D. & D. 555; and the appointment of the attorney need not be under seal, *Naylor v. Mortimore*, 17 C. B. N. S. 207.

(*o*) See *Ex parte Patchelor*, 2 Rose, 26.

(*p*) *Re Daintry*, 2 M. D. & D. 257, shows that leave to appoint an inspector will not be granted before the assignees are chosen; and *Ex parte Holford*, ib. 485, shows that liberty to appoint an inspector will

one of the bankrupts can show that their interests require it, they will be allowed to appoint an inspector of the separate estate of the bankrupt in question; and the inspector appointed will be empowered to collect, and get in, such separate estate, and to use the names of the assignees for that purpose, indemnifying them against the costs of proceedings taken in their names; he will also be directed to pay what he may receive into such bank as the separate creditors may select; and will be authorised to inspect, and take copies of, all books and documents in the possession of the assignees, and relating to the separate estate (*q*). The costs of obtaining an order for liberty to choose an inspector, and also the costs, charges, and expenses, properly incurred by him in the execution of his duties, must be borne by the estate to protect which he is appointed (*r*).

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SECTION II.—THE PROPERTY WHICH VESTS IN THE ASSIGNEES, AND THE CONSEQUENCES OF SUCH VESTING.

1. Generally.

Speaking generally, it may be said, that when a trader is adjudicated bankrupt, all property, both real and personal, to which he is then beneficially entitled, or to which he becomes beneficially entitled before he obtains his order of discharge, vests in his assignees, for the benefit of his creditors. Ordinary freehold estates, to which the bankrupt is entitled for life, or in fee, vest in his assignees (*s*), subject to such mortgages or charges as may affect them (*t*). Lands of which a bankrupt is

Property vesting
in assignees.

Lands.

not be refused simply because there is no imputation against the assignees.

(*q*) See *Ex parte Wright*, 2 M. D. & D. 434; *Ex parte Wilson*, 1 ib. 310; *Ex parte Dawson*, 3 D. & C. 12; *Ex parte Batson*, 1 Gl. & J. 269; *Ex parte Miles*, 2 Rose, 68; *Ex parte Basarro*, 1 ib. 266.

(*r*) *Ex parte Holford*, 2 M. D. & D. 485, and see the cases in the last note.

(*s*) 12 & 13 Vict. c. 106, §§ 142 to 148; 24 & 25 Vict. c. 134, § 115.

(*t*) Where land is devised to a trader charged with a sum of money which is allowed to remain on the security of the land, his assignees can only claim the land subject to the charge. See *Ex parte Forster*, 1 M. D. & D. 418, and 2 ib. 177, under the name *Hudson v. Forster*. See, too, *Ex parte Barff*, De Gex, 613.

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seised in tail, do not, strictly speaking, vest in his assignees; but such lands may be disposed of for the benefit of his creditors (*u*); and a similar observation applies to the bankrupt's copyholds (*v*). Freeholds, or leaseholds, held by the bankrupt, subject to the payment of rent, may either be accepted or rejected by his assignees; and they may be compelled to declare their option by the person entitled to the rent (*w*).

Chattels.

The personal property of a bankrupt, including all debts owing to him, also vest in his assignees (*x*); and there is this important distinction between land and chattels, that whilst the first only vests in the assignees, subject to such mortgages as may affect it, the latter, if allowed by the person to whom they are pledged to remain in the bankrupt's possession, will, by virtue of the doctrines of reputed ownership, be distributable as part of the bankrupt's estate, as if they were his absolutely (*y*).

The assignees are also entitled to the benefit of contracts made with the bankrupt for valuable consideration (*z*).

Where chattels purchased by the bankrupt have actually come to his possession, they pass to his assignees, although he may not have paid for them; but if they have not come to his possession, the seller can retain them, or stop the delivery of them until their price is paid (*a*).

Books of account.

No person is entitled as against the assignees to withhold possession of the books of account of the bankrupt, or to claim any lien thereon (*b*).

Debts, goodwill, &c.

The assignees may, also, under certain restrictions, sell and assign any debts owing to the bankrupt, and the goodwill of his trade or business, to a purchaser, who may sue for the

(*u*) 12 & 13 Vict. c. 106, § 208.

(*v*) 24 & 25 Vict. c. 134, § 114.

(*w*) 12 & 13 Vict. c. 106, § 105, and 24 & 25 Vict. c. 134, § 131. See *Goodwin v. Noble*, 8 E. & B. 587.

(*x*) 12 & 13 Vict. c. 106, § 141. As to debts under 10*l.*, see 24 & 25 Vict. c. 134, § 128. Debts owing to the bankrupt by a person to whom he is indebted, are subject to

set-off, as will be seen hereafter.

(*y*) See *Jones v. Gibbons*, 9 Ves. 407, and see *infra*.

(*z*) See *Beckham v. Drake*, 2 Ho. Lo. Ca. 579; *Valpy v. Oakeley*, 16 Q. B. 941; *Whitmore v. Gilmour*, 12 M. & W. 808.

(*a*) See as to stoppage in transitu, *Lickbarrow v. Mason*, 1 Sm. L. C.

(*b*) 24 & 25 Vict. c. 134, § 121.

debts in his own name as effectually, and with the same privileges concerning proof of the requisites of bankruptcy and other matters, as the assignee himself (c).

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It is not unusually said that the assignees represent the bankrupt, and have no more extensive rights against third persons, than the bankrupt himself would have had if he had continued solvent: but this proposition is much too general. It cannot be relied upon as regards property affected by the doctrines of reputed ownership, nor as regards acts done by the bankrupt since the commission by him of an act of bankruptcy, nor, as regards acts which, though binding on him, are fraudulent as against his creditors (d). Except, however, as regards such matters, the rule holds good; and its consequences are important, especially with respect to bankrupt trustees and bankrupt partners.

Assignees stand
in the place of
the bankrupt.

The assignees of a bankrupt trustee have no right whatever to, or over, the property of which he is trustee (e); and this doctrine is so well established, that, if a debtor assigns a debt before he becomes bankrupt, an action for the recovery of that debt must be brought in his name, after an adjudication of bankruptcy has been made against him (f). The assignees have no interest in such a debt, and cannot sue for it (g). It has been already observed, that a debtor who, in contemplation of bankruptcy, restores to, or sets apart for his *cestui que trust* that which is vested in himself merely as a trustee, does not commit an act of fraudulent preference (h); and if a bankrupt has had property entrusted to him for a particular purpose, his assignees must apply it to that purpose (i); and if, being

Trust property.

(c) *Ib.* § 137.

(d) See as to this, *Anderson v. Maltby*, 2 Ves. J. 255; *Billiter v. Young*, 6 E. & B. 40.

(e) *Joy v. Campbell*, 1 Sch. & Lef. 328; *Pinkett v. Wright*, 2 Ha. 120. See as to reputed ownership, *infra*, and as to the effect of an equitable assignment, *Burn v. Carvalho*, 4 M. & Cr. 690.

(f) *Winch v. Keeley*, 1 T. R. 619; *Boddington v. Castelli*, 1 E. & B. 879, affirming *Castelli v. Boddington*, *ib.* 66.

ton, *ib.* 66.

(g) *Carpenter v. Marnell*, 3 Bos. & P. 40.

(h) *Sinclair v. Wilson*, 20 Beav. 324; *Gardner v. Rowe*, 2 Sim. & Stu. 346.

(i) *Ex parte Waring*, 19 Ves. 344; *Ex parte Imbert*, 1 De G. & J. 152; *Ex parte Carrick*, 2 *ib.* 208; *Ex parte Gledstones*, 3 M. D. & D. 109; *Ex parte Mackey*, 2 *ib.* 136; *Ex parte Glyn*, 1 *ib.* 25; *Ex parte Brown*, 3 M. & A. 471. And see,

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Property vesting
in the assignees
of a bankrupt
firm.

unable to accomplish it the bankrupt has returned the property, his assignees cannot recover it (*k*).

When a firm of partners is adjudicated bankrupt, or when a joint adjudication is made against two or more partners, all the joint property of the bankrupts, as well as all the separate property of each of them, vests in the assignees (*l*). Moreover, their joint property vests in the assignees, as joint property, and without reference to the equality or inequality of the bankrupt's shares therein (*m*).

When each of the members of a firm is separately adjudged bankrupt, the assignees of them all, cannot recover, in one action, debts due to the firm, and also debts due to the partners separately. The assignees of each partner must sue alone for the recovery of debts due to him only (*n*).

Property vesting
in assignees of
bankrupt part-
ner.

When one of several partners is adjudicated bankrupt, his assignees become entitled to all his separate property, and to all his interest in the joint property; but, subject to the qualification alluded to above, they can claim no more than the bankrupt himself would have been entitled to, had he not become bankrupt; and every lien available for his co-partners against him is equally available for them against his assignees (*o*). Consequently the assignees can claim nothing as the bankrupt's share until all the joint creditors have been paid (*p*), and the partnership accounts have been duly taken and ad-

as to a creditor's right of appropriating securities to one debt rather than to another, *Ex parte Johnson*, 3 De G. Mac. & G. 218, and the cases above cited.

(*k*) *Edwards v. Glyn*, 2 E. & E. 29; *Toovey v. Milne*, 2 B. & A. 683; *Moore v. Barthrop*, 1 B. & C. 5. See *ante*, p. 1078.

(*l*) *Ex parte Cook*, 2 P. W. 500; *Hayne v. Rolleston*, 4 Burr. 2176; *Bolton v. Puller*, 1 Bos. & P. 539; *Graham v. Mulcaster*, 4 Bing. 115. So under the Indian Insolvency act, 11 & 12 Vict. c. 21, *Brown v. Carbery*, 16 C. B. N. S. 2.

(*m*) *Ex parte Hunter*, 2 Rose, 382.

(*n*) See *Hancock v. Haywood*, 3 T. R. 433; and as to the declaration in an action by several sets of assignees for the recovery of a joint debt, see *Ray v. Davies*, 8 Taunt. 134.

(*o*) See *Anon.*, 3 Salk. 61, and 12 Mod. 446; *Fox v. Hanbury*, Cowp. 445; *West v. Skip*, 1 Ves. S. 232; *Bolton v. Puller*, 1 Bos. & P. 548. 1 Mont. Part. note P, p. 66.

(*p*) *Taylor v. Fields*, 4 Ves. 396; *Holderness v. Shackels*, 8 B. & C. 612; *Richardson v. Gooding*, 2 Vern. 293; *Ex parte Terrell*, Buck. 345; *Gross v. Dusfresnay*, 2 Eq. Ab. 110, pl. 5.

justed (*q*). On the other hand, the solvent partners have no right to insist on taking the partnership assets to themselves, and to pay the assignees the estimated value of the bankrupt's share; for the right of the assignees against them, as well as their right against the assignees, is to have an account, and a sale and distribution (*r*). In one case it was even decided, that a stipulation in the articles of partnership to the effect that, on the bankruptcy of one of the partners, his share should be taken by the others at a valuation, was not binding on the assignees (*s*); but the circumstances of the case were somewhat peculiar; and there seems no reason why such a stipulation should necessarily be ineffectual.

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In *Whitmore v. Mason* (*t*), partnership articles contained a provision that, on the bankruptcy of a partner, an account should be taken and a valuation made of his share and interest in the partnership property, with the exception of a particular lease. It was held that this exception was void, as against the assignees of a partner who had become bankrupt, and that they were entitled to his share in the lease. The provision as to valuing the bankrupt's share was not sought to be avoided by the assignees.

Whitmore v. Mason.

Upon principles which have already been discussed, the assignees of a bankrupt partner are entitled to an account, not only of the assets as they stood at the time of the dissolution of the firm, but also of the profits subsequently made by the employment of the bankrupt's capital in the partnership business (*u*).

Profits accruing
subsequently to
bankruptcy.

(*q*) See *West v. Skip*, 1 Ves. S. 232, 456.

(*r*) *Crawshay v. Collins*, 15 Ves. 229; *Wilson v. Greenwood*, 1 Swanst. 471.

(*s*) *Wilson v. Greenwood*, 1 471.

(*t*) 2 J. & H. 204.

(*u*) See *ante*, p. 989, *Crawshay v. Collins*, 15 Ves. 218, 1 J. & W. 267, and 2 Russ. 325; *Smith v. De Silva*, Cowp. 469. This last case seems at first sight to be opposed to the existence of that lien which is above stated to be available against

the assignees. But the question before the Court was simply whether the assignees had a right to share profits accruing since the bankruptcy, and Lord Mansfield very properly held that they had. His judgment certainly shows that he considered the assignees were entitled to those profits without paying what was due from the bankrupt to his co-partners; but on this point the case cannot, it is conceived, be supported. See 8 B. & C. 618.

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Right of assignees to account from the executors of a deceased partner.

Assignees do not become partners.

Bankruptcy a cause of dissolution.

Where there is a firm of two partners, and one partner dies, and the other becomes bankrupt, the assignees of the latter are entitled to institute a suit on behalf of themselves, and all the other creditors of the deceased against his executors, for the administration of his estate, and for payment of what may be due therefrom to his surviving partner (*v*).

The assignees, it will be observed, do not become co-partners with the solvent partners. Like purchasers from the sheriff under an execution against one partner, the assignees and the solvent partners become tenants in common of the real and personal property belonging to the firm (*x*). Moreover, as the sheriff, in the case of an execution against one partner, is entitled to seize the whole of the partnership property, so the messenger of the Court of Bankruptcy, in the case of an adjudication against one partner, is in strictness entitled to put a person in possession of the whole of the property of the firm. This, however, is seldom done, as the solvent partners, either by consent, or through the intervention of the Court, make arrangements for securing to the assignees payment of the bankrupt's share in the assets of the firm.

When one partner only is adjudged bankrupt, the *firm* is thereby nevertheless dissolved (*y*). If it were not, the solvent partners would have forced upon them as co-partners, persons with whom they had never agreed to be in partnership; a result which would be contrary to the fundamental principle that partnership cannot subsist between any persons save by the mutual consent of them all. The bankruptcy of one partner, moreover, dissolves the firm, not only as to him, but as to all the other co-partners, *inter se* (*z*); for, in the first place, a partnership, being a mere assemblage of persons bound together by contract, loses its identity, as much by the bankruptcy, as by the death, of one of those persons; and in the next place, such is the law of this country, that the share of a bankrupt partner cannot be ascertained, save by taking the accounts of the

(*v*) See *Addis v. Knight*, 2 Mer. 119.

(*x*) See *Fox v. Hanbury*, Cowp. 445.

(*y*) *Fox v. Hanbury*, Cowp. 448;

Ex parte Smith, 5 Ves. 297, 1 Mont. Part. note E, p. 22.

(*z*) See *Hague v. Rolleston*, 4 Burr. 2174; *Fox v. Hanbury*, Cowp. 448;

Crawshay v. Collins, 15 Ves. 228.

whole firm, and distributing its clear assets amongst the solvent partners and the assignees of the bankrupt partner. Bk. IV. Chap. 2.
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The doctrine that on the bankruptcy of one member of a firm the whole firm is dissolved, is not, it seems, applicable to mining partnerships (*a*); and although the bankruptcy of a shareholder in an unincorporated company with transferable shares may dissolve the company as to him (*b*), it is conceived that such bankruptcy does not dissolve it as to the other shareholders *inter se* (*c*). Rule as to
companies.

When a debtor who is a shareholder in a company becomes bankrupt, his assignees become entitled to his shares (*d*), but it by no means follows that they become shareholders in respect of such shares (*e*). In order that the assignees may become shareholders, it is necessary for them to comply with the company's regulations in that behalf; if they neglect to do this, and leave the shares in the name of the bankrupt, then, as they will not become shareholders, so they will not be entitled as such to notices of calls or intended forfeitures; and consequently, if a call is made and not paid, and the company has power to forfeit shares for the non-payment of calls, the assignees' title may be defeated by a forfeiture of which they have not received notice (*f*). The assignees of a bankrupt shareholder can only take his shares subject to the lien of the company upon them (*g*); and if the shares are held by him in trust for other people, his assignees will have no right to them whatever (*h*), unless the trust is a secret trust, and Bankruptcy of
shareholder.

(*a*) *Ex parte Broadbent*, 1 Mont. & A. 638; *Bentley v. Bates*, 4 Y. & C. Ex. 190.

(*b*) *Greenshield's case*, 5 De G. & S. 559.

(*c*) See as to this, *ante*, p. 238.

(*d*) *Penny v. Pickwick*, 16 Beav. 246; *Ex parte Neilson*, 3 De G. Mac. & G. 556; *Graham v. Van Diemen's Land Co.*, 11 Ex. 100; *Lawrence v. Knowles*, 5 Bing. N. C. 399. Compare *Dawson v. Rishworth*, 4 B. & Ad. 574.

(*e*) See, in addition to the cases in the next and in the last note, *South Staffordshire Rail. Co. v.*

Burnside, 5 Ex. 129. See, also, *Copeland v. Stevens*, 1 B. & A. 593, as to the vesting of burdensome property in assignees.

(*f*) *Graham v. Van Diemen's Land Co.*, 1 H. & N. 541.

(*g*) *Child v. Hudson's Bay Co.*, 2 P. W. 207; *Ex parte Cooper*, 2 M. D. & D. 1. See, too, *Pinkett v. Wright*, 2 Ha. 120, where, however, it was held that a banking company had no lien on the shares of a customer who had overdrawn his account. See, too, *Meliorucchi v. Royal Ex. Co.*, 1 Eq. Ca. Ab. 9.

(*h*) See *Pinkett v. Wright*, 2 Ha.

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the shares are in the order and disposition of the bankrupt (*i*). So, the assignees of a shareholder who has pledged his shares, can only take them subject to what is due upon them, unless they can claim them by virtue of the doctrine of reputed ownership (*k*).

The liability of assignees of a bankrupt shareholder to be made contributories on the winding up of the company in which the shares are held, will be examined hereafter.

2. *Of set-off and mutual credit.*

Mutual credits.

With respect to debts owing to a bankrupt by persons to whom he is indebted, the balance only is regarded as payable to or by his estate. This equitable doctrine rests upon a statutory enactment (*l*), which allows debts to be set off against each other in many cases in which they could not be set off had no bankruptcy intervened (*m*). The enactment which now regulates this subject is as follows (*n*):—

12 & 13 Vict. c.
106, s. 171.

“That where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the Court shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed.”

Tendency to
allow rather than
disallow set-off.

The above clause is evidently framed with a view of preventing the great injustice which would arise if a person who

120; *Joy v. Campbell*, 1 Sch. & Lef. 328.

(*i*) See as to this, *Ex parte Burbidge*, 1 Deac. 131.

(*k*) *Ex parte Dobson*, 2 M. D. & D. 685; *Ex parte Moss*, 3 De G. & S. 599.

(*l*) It was however recognised

before the mutual credit clause found its way into the Bankrupt acts. See *Anon.*, 1 Mod. 215; *Chapman v. Derby*, 2 Vern. 117.

(*m*) See *Ex parte Stephens*, 11 Ves. 24.

(*n*) 12 & 13 Vict. c. 106, § 171.

was the creditor of a bankrupt on one account and his debtor on the other, were compelled to pay twenty shillings in the pound on what he owed to the bankrupt, and to receive less than twenty shillings in the pound on what the bankrupt owed him. There is, therefore, a strong tendency to construe the clause in question extensively rather than restrictively, or, in other words, to favour the setting off of cross demands by and against bankrupts (*o*); at the same time the courts cannot carry the doctrines of set-off further than the language and spirit of the enactment warrant, and some of the earlier cases on the subject have been considered as having gone too far (*p*).

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The general doctrine is well-illustrated by *French v. Fenn*, and *Easum v. Cato*. In *French v. Fenn* (*q*), the defendant purchased a row of pearls, and agreed with one Cox to give him one-third of the profits to arise from a sale of them. Cox became bankrupt, and afterwards the defendant sold the pearls, and Cox's assignees demanded one-third of the profits of the sale, declining to allow the defendant to set off a debt due from Cox to him at the time of the bankruptcy; but it was decided that such set-off ought to be allowed. The Court held that there was a great distinction between mutual debts and mutual credits, and that, although the defendant was not indebted to Cox at the time of his bankruptcy, inasmuch as the pearls had not then been sold, there was a clear case of mutual credit justifying the set-off.

French v. Fenn.

Easum v. Cato (*r*) goes even further than the last case. There the bankrupts shipped goods for sale in the name of *Cato*, to whom they were indebted; *Cato* assented to the use of his name, and he received the proceeds of the sale; he was sued for these proceeds by the assignees, and was held entitled to set off against them what was owing to him by the bankrupts, although the goods were in no sense his.

Easum v. Cato.

The authority of these cases has been sometimes thought to be shaken by *Young v. The Bank of Bengal* (*s*). There the

Young v. Bank of Bengal.

(*o*) See *Ryall v. Rowles*, 1 Ves. S. 375. Bank. Law, 565 (ed. 8).

(*r*) 5 B. & A. 861.

(*p*) This is particularly the case with *Ex parte Deeze*, 1 Atk. 228, and *Ex parte Quintin*, 3 Ves. 248. (*s*) 1 Deac. 622. See on this case, *Alsager v. Currie*, 12 M. & W. 751.

(*q*) 2 Doug. 257, and Cooke's

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Privy Council held that bankers with whom notes of the East India Company had been deposited as a security for a loan, and who were empowered to sell the notes if the loan was not paid, were not entitled, after their debtor had become bankrupt, to set off the proceeds of the sale of the notes against a debt owing by the bankrupt to them unconnected with the loan in question, and arising from the discount by the bankers of the bankrupt's paper before such loan was made. In this case, however, not only had the notes deposited with the bankers not been sold by them before the bankruptcy, but the bankers were, in truth, precluded by their own agreement from holding the deposited paper for any other purpose than as a security for the loan to which it was specifically appropriated. *Young v. The Bank of Bengal*, therefore, merely shows that the right to set off cross money demands under the mutual credit clause, only exists where there is no agreement inconsistent with the exercise of such right (t).

Set-off allowed
independently of
intention.

It has, however, long been established that mutual credit within the meaning of the bankrupt act, may exist independently of any intention to create a right of set-off. For example, if A. sells goods to B., and B. obtains from third parties an acceptance of A.'s without his knowledge, A.'s claim against B. for the goods sold, and B.'s claim against A. on the bill, may be set off on A.'s bankruptcy, although the acceptance has not fallen due (u).

Cases of bills
returned dis-
honoured.

Moreover, the mutual credit clause applies, although the demand of the bankrupt may not have been continuous from the time when it accrued to the time of the bankruptcy. This is often the case when the bankrupt's claim rests on a bill of exchange which he has indorsed away, but which after his

(t) *Ex parte Flint*, 1 Swanst. 30
Key v. Flint, 8 Taunt. 21; *Thomas v. Da Costa*, 8 Taunt. 345, and
Buchanan v. Findlay, 9 B. & C. 738, also illustrate this doctrine. See, too, *Hill v. Smith*, 12 M. & W. 618. See, further, as to general liens and to their not attaching to particular securities. *Brandao v. Barnett*, 1 Man. & Gr. 908; 6 ib. 620; and 12 Cl. & Fin. 787; *Bock*

v. Gorrissen, 2 De G. F. & J. 434; *Jones v. Peppercorne*, Johns. 430; *Olive v. Smith*, 5 Taunt. 56; and as to liens on funds appropriated to the payment of particular bills, see *Inman v. Clare*, Johns. 769; *Jef-fryes v. Agra and Masterman's Bank*, L. R. 2 Eq. 674.

(u) *Hankey v. Smith*, 3 T. R. 507.

bankruptcy is returned dishonoured. Thus in *Bolland v. Nash* (v), A. accepted a bill for advances made to him by his bankers, and they endorsed the bill to a third person for value and became bankrupts. The indorsee was himself indebted to the bankers; and he having required A. to pay the bill, which A. refused to do, and having then set the debts due to himself from the bankers and to them from himself against each other, returned the bill to the assignees. They then sued A. upon it, but it was held that he was entitled to set off the balance due from the bankers to him on his account with them at the time of their bankruptcy, although at that time they did not hold his bill.

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Bolland v. Nash.

It is also established that demands by and against a bankrupt may be set off, although they may not have become enforceable previously to his bankruptcy; *e. g.* where bills have been accepted but have not become due (w).

Debts not yet due.

In order, however, that cross demands may be set off against each other under the mutual credit clause, it is necessary

Rules as to set-off in cases of bankruptcy.

1. That both demands shall be money demands, and that the sum sought to be set off against the assignees shall be proveable against the bankrupt's estate;

2. That the demands shall be mutual;

3. That the demand against the bankrupt shall have arisen before the demandant had notice of the commission of an act of bankruptcy.

First, as to the nature of the demands.—It was held in the well-known case of *Rose v. Hart* (x) that a fuller, who was sued by the assignees of a bankrupt for the recovery of cloths sent to be dressed, could not retain the goods until he was paid all monies owing by the bankrupt for services previously rendered him. The assignees' demand was not in substance a money demand at all; they claimed the goods; and against such a claim it was decided that the fuller could only oppose his lien for what was due in respect of his work on those goods (y).

1. The cross demands must be money demands.

Rose v. Hart.

(v) 8 B. & C. 105. See, too, *Ex parte Staddon*, 3 M. D. & D. 256, noticed *infra*; and *Ex parte Huckey*, 1 Madd. 577.

child, 8 Taunt. 156.

(w) *Ex parte Wagstaffe*, 13 Ves. 65; *Ex parte Boyle*, Cooke's Bank. L. 571 (ed. 8); *Sheldon v. Roths-*

(x) 8 Taunt. 499, and 2 Sm. L. C. 172 (ed. 4), following *Ex parte Ockenden*, 1 Atk. 235, and correcting *Ex parte Deeze*, 1 Atk. 228, and *Ex parte Prescott*, *ib.* 230.

(y) If the defendant had sold the

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The doctrine thus established in *Rose v. Hart*, viz., that by mutual credits are meant credits which from their nature must, or at all events probably will, terminate in debts (*i.e.* money demands), has ever since been recognised as correct.

Whether for li-
quidated sums?

Formerly it was held that a demand for unliquidated damages, was not a credit within the meaning of the bankrupt act, and could not therefore be set-off (*z*); but now that claims for unliquidated damages may be proved in bankruptcy the reason for this rule has ceased, and a plea of set-off for unliquidated damages may, it is conceived, be supported (*a*).

Abbott v. Hicks.

Under the old law it was decided in *Abbott v. Hicks* (*b*), that a partner who had retired and had agreed to pay his co-partners a sum of money, could not, on their bankruptcy, set off against this debt of his, a demand against them founded on an agreement by them to indemnify him against the debts of the firm; and in *Bell v. Carey* (*c*) it was held that in an action by the assignees of a bankrupt for damages sustained by the defendant's breach of an agreement to provide funds to meet a bill, the defendant could not set off a debt owing by the bankrupt to him.

Bell v. Carey.

Examples of
mutual credit.

Such demands as the following were, however, capable of being set off even under the old law; viz., the demand of a holder of a bill against its drawer, acceptor, or endorser (*d*); the demand of the acceptor or endorser of an accommodation bill against the person for whose accommodation the bill is accepted or drawn (*e*); the demand arising from the sale of goods to be paid for by a bill (*f*).

2. The cross
demands must
be mutual.

Secondly, as to the mutuality of the demands.—Cross demands cannot be set off against each other, unless they exist in favour

goods, and the assignees had sued for the money produced by their sale, the result would, it is conceived, have been the same. See *Ex parte Ross*, Buck, 125.

(*z*) See *Rose v. Sims*, 1 B. & Ad. 521. Compare *Gibson v. Bell*, 1 Bing. N. C. 743.

(*a*) See 24 & 25 Vict. c. 134, § 153. In *Makeham v. Crow*, 15 C. B. N. S. 847, such a plea was allowed to be pleaded, but with

what result does not appear.

(*b*) 5 Bing. N. C. 578.

(*c*) 8 C. B. 887.

(*d*) See *Alsager v. Currie*, 12 M. & W. 751; *Forster v. Wilson*, ib. 191.

(*e*) *Hulme v. Mugglestone*, 3 M. & W. 30; *Russell v. Bell*, 8 ib. 277; *Bittleston v. Timmis*, 1 C. B. 389.

(*f*) *Groom v. West*, 8 A. & E. 758; *Gibson v. Bell*, 1 Bing. N. C. 743.

of and against the same persons in the same rights. In *Forster v. Smith* (g), Wilson & Co. were on the one hand indebted to their bankers, and were on the other hand their creditors in respect of three parcels of bank notes. One of these parcels belonged to Wilson & Co.; another parcel also belonged to them, but only as a security for debts owing to them by third persons; the third parcel was held by Wilson & Co. merely as trustees. On the bankruptcy of the bankers it was held that Wilson & Co. were entitled to set off against their debt to the bankers the amount of the two first parcels of notes, but not the amount of the third.

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Forster v. Smith.

Other cases may be referred to as authorities for the proposition that a debt owing by a person in his individual capacity cannot, in bankruptcy, be set off against a debt owing to him as trustee (h).

It was at one time thought that in an action by the assignees of a bankrupt the defendant could not set off a debt due to him from the bankrupt; as although the assignees might sue him he could not sue them (i). But this notion has long been deservedly exploded (k). Even now, however, it is held that if some only of the members of a firm are bankrupt, and the assignees of the bankrupt partners, together with the solvent partners, join in an action for the recovery of a debt due to the firm, the defendant cannot set off a debt due from the firm to him (l). The statute applies in terms only to demands by and against bankrupts, whilst in the case supposed the demands sought to be set against each other are demands by and against bankrupts and solvent persons. Moreover, in the case supposed, the creditor of the firm is in a position to obtain payment of the whole of his debt from the solvent partners; he is therefore in a very different situation from a creditor who has bankrupts only for his debtors, and the mutual credit clause is supposed to have been designed for the protection of such creditors and no others.

Case where one partner only is bankrupt.

(g) 12 M. & W. 191.

and Bull. N. P. 181.

(h) See *Fair v. McIver*, 16 East, 130; *Boyd v. Mangles*, 16 M. & W. 337; *Watts v. Christie*, 11 Beav. 546.

(k) See *Ridout v. Brough*, Cowp. 133.

(l) *Staniforth v. Fellows*, 1 Marsh, 184; *Thomason v. Frere*, 10 East, 148.

(i) *Ryall v. Larkin*, 1 Wils. 155,

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Joint debts cannot be set off against separate debts.

Watts v.
Christie.

Other illustrations of same principle.

The doctrine of mutuality is of especial importance to partners; for from it, it follows that a demand against a firm cannot be set off against a cross demand of some or one only of its members, and that a demand by one or more partners cannot be met by setting off a cross demand against a firm consisting of him or them and others. This rule is as clearly established in bankruptcy as it is at law and in equity, when the rights of solvent persons only are under consideration (m).

In *Watts v. Christie* (n), bankers were indebted to A. on his separate account, but were creditors of A. & Co. on their joint account. Whilst the bankers were in difficulties, but before they committed any act of bankruptcy, A. assigned what was due to him on his separate account to A. & Co., and directed the bankers to transfer what was standing to his credit, to the credit of A. & Co. This, however, was not done. On the bankruptcy of the bankers it was held that A. & Co. could not set off what was due from them to the bankers against what was due from the bankers to A.

Again, if A. and B. are partners, and C. is indebted to them, and A. and B. dissolve partnership, and its business is continued by B. and he becomes indebted to C., who is afterwards adjudged bankrupt; B. cannot set off his separate debt to C. against the debt due from C. to the late firm of A. and B. (o).

These principles apply where one partner only is bankrupt, and his separate estate is more than sufficient to pay his separate debts. Even in such a case a debt due to him and the solvent partners jointly cannot be set off against a debt due by him alone (p).

Moreover, where A., B. and C. are jointly indebted to D., who is himself indebted to A., B. and C. separately and on several accounts, D.'s separate demands against A., B. and C.

(m) *Ex parte Soames*, 3 D. & C. 320; *Ex parte Twogood*, 11 Ves. 517; *Lanesborough v. Jones*, 1 P. W. 325.

(n) 11 Beav. 546.

(o) *Ex parte Ross*, Buck, 125. The marginal note in this case is

apt to mislead.

(p) *Ex parte Twogood*, 11 Ves. 516. *Ex parte Quintin*, 3 Ves. 248, is opposed to this, but cannot now be considered law. Neither can *Ex parte Edwards*, 1 Atk. 100, be relied upon.

respectively cannot be met by setting off their respective proportions of the debt owing by them jointly to D. (q).

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In connection with this subject it is necessary to advert to *James v. Kynnier* (r). There A. and B. were jointly indebted to C., who required payment, or to be accommodated with a loan to the amount due to him. A. thereupon lent C. the amount due to him, and received his promissory note for it. C. became bankrupt, and it was held that the debt due from A. and B. had in fact been paid by A., and that both the promissory note given by C. and the security given to C. by A. and B., ought to be given up to be cancelled. The case is one rather of payment than of set-off, and cannot be considered as opposed in principle to the rule that a joint debt cannot be set off against a separate debt, and *vice versâ*.

James v. Kynnier.

It is hardly necessary to observe that an agreement to the effect that a joint shall be set off against a separate debt, or *vice versâ*, is perfectly valid, and if duly entered into will be binding, notwithstanding the subsequent bankruptcy of the parties (s). So, if parties choose to agree that demands which they would otherwise be entitled to set off shall be kept separate and distinct, and then bankruptcy ensues, the agreement will nevertheless be binding upon them, as has already been seen (t).

Agreements to set off joint debts against separate.

It is also to be borne in mind, that notwithstanding the rule which precludes the setting off of joint debts against separate debts, and the setting off of a debt due to a person as trustee against a debt due by him in his individual capacity, it is nevertheless held that where all the members of a firm save one are dead, the survivor can set off debts due from him individually against debts due to him as surviving partner, and *vice versâ* (u).

Case where all partners save one are dead.

(q) *Ex parte Christie*, 10 Ves. 105.

(r) 5 Ves. 108.

(s) In *Kinnersley v. Hossack*, 2 Taunt. 170, there was such an agreement. See, too, *Vulliamy v. Noble*, 3 Mer. 618, where the agreement was inferred from past dealings.

(t) See acc. *Ex parte Flint*, 1 Swanst. 30, and *Young v. Bank of Bengal*, 1 Deac. 622, noticed *ante*, p. 1103.

(u) See *Slipper v. Stidstone*, 5 T. R. 593; *French v. Andrade*, 6 ib. 582, and *ante*, pp. 516, 517, where the propriety of this doctrine is questioned.

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Application of
doctrines of set-
off to sureties.

It remains to notice the application of the doctrine of mutuality of credit to the case of sureties. Where there are cross claims between a creditor and his principal debtor, capable of being set off against each other, the surety of the debtor can in bankruptcy insist that these claims shall be set against each other, so that he may be exonerated if possible (*w*).

Ex parte
Stephens.

A very remarkable extension of this principle was made in *Ex parte Stephens* (*x*). In that case a lady was a creditor of her bankers, although she did not know it, and she as surety for her brother joined him in a joint and several note to secure repayment of 1000*l.* lent him by the bankers. The bankers became bankrupt, and the assignees sued the brother alone upon the note; but Lord Eldon, upon the petition of the brother and the sister, stayed the action, and ordered that the money due on the note by the brother and his sister as his surety should be set off against the money owing by the bankrupts to the sister alone (*y*).

Ex parte
Staddon.

Again, in *Ex parte Staddon* (*z*), bankers advanced to a customer, A., 500*l.* on the security of his promissory note, and deposited this note and others with B. & Co. as a security for advances made by them. The bankers became bankrupt. At the time of their bankruptcy, A. was the holder of their notes to the amount of 520*l.*, and B. & Co. had in their hands securities of the bankrupts more than sufficient to cover what was due from them for advances made to them by B. & Co. B. & Co. compelled A. to pay his promissory note, he being ignorant of the dealings between them and the bankers. Subsequently, B. & Co., having been paid all that was due to them from the bankrupts, delivered up to the assignees the securities in their hands. It was held, that as between A. and the bankers, A. was entitled, first, to be repaid what he had paid to B. & Co. as their surety, and secondly, to set off against

(*w*) *Ex parte Hanson*, 12 Ves. 346, and 18 ib. 232.

(*x*) 11 Ves. 24. The circumstances of this case were peculiar. A gross fraud had been committed by the bankers on the sister, by inducing her to believe that they had bought stock for her as requested, when in

point of fact they had done no such thing, but had applied her money to their own use.

(*y*) See, too, *Vulliamy v. Noble*, 3 Mer. 621.

(*z*) 3 M. D. & D. 256. Compare *Bolland v. Nash*, 8 B. & C. 105.

what was due from him to the assignees on his promissory note, the amount due to him from the bankrupts in respect of their notes in his hands. Bk. IV. Chap. 2.
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Before quitting the subject of mutuality, it may be observed that demands founded on simple contracts, and demands founded on specialties, may be set against each other; for although such demands differ from each other in many important respects, those differences do not prevent them from being mutual within the meaning of the bankrupt laws (a). Simple contract debts may be set off against specialty debts.

Thirdly, as to notice of the act of bankruptcy.—The language of the mutual credit clause precludes the setting off of a demand accruing against a bankrupt by reason of anything done after notice of an act of bankruptcy committed by him (b). Therefore, although where bankers first stop payment and then commit an act of bankruptcy, a holder of their notes can set off such of them as came to his hands before the act of bankruptcy (c), he cannot set off those which came to his hands after that event, if he had notice of it (d). So, if a person commits an act of bankruptcy which is known to his bankers, and they nevertheless afterwards honour his drafts, they cannot set off the payments in respect of them, against the demand of the assignees for the balance standing to the credit of the bankrupt at the time the act of bankruptcy was committed (e). 3. Demands arising after notice of an act of bankruptcy cannot be set off.

With a view to avoid paying debts to assignees in bankruptcy, recourse is frequently had by the debtors of a failing person to the expedient of buying up his acceptances in order to set them off against the sums which the purchasers owe him. If a debtor obtains the acceptances of his creditor in this way for himself, and without notice of any act of bankruptcy, the debtor will be able to set off the full amount of the Buying up bills of bankrupt.

(a) *Lanesborough v. Jones*, 1 P. & W. 191.
W. 325. See, too, 8 Geo. 2, c. 24, § 5.

(b) *Ante*, p. 1102, and see *Hawkins v. Penfold*, 2 Ves. S. 550; *Vernon v. Hankey*, 2 T. R. 113.

(c) *Hawkins v. Whitten*, 10 B. & C. 217; *Dickson v. Cass*, 1 B. & Ad. 343; *Forster v. Wilson*, 12 M.

(d) *Dickson v. Cass*, 1 B. & Ad. 343, where some only of the firm had committed acts of bankruptcy.

(e) *Vernon v. Hankey*, 2 T. R. 113, and 3 Bro. C. C. 313. See, too, *Kynaston v. Crouch*, 14 M. & W. 266; *Tamplin v. Diggins*, 2 Camp. 312.

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acceptances, however little he may have paid for their purchase (*f*); but it will be otherwise if he had notice of the act of bankruptcy (*g*); or if he has obtained the acceptances not *bonâ fide* to protect himself, but as a trustee for others, and in order to enable them to avail themselves of his right of set-off (*h*). How far these rules are applicable to the case of failing companies has not yet been decided.

3. *Of the time from which the title of the assignees dates.*

Relation back of
assignees' title.

When a debtor is made bankrupt on his own petition, the title of his assignees to his property dates from the time of adjudication (*i*). But when a debtor is adjudged bankrupt on a creditor's petition, then the title of the assignees to the bankrupt's property dates, not from the time of adjudication, but from a time anterior thereto, viz., from the time of the commission of the earliest act of bankruptcy subsequent to the accrual of the petitioning creditor's debt (*k*). As regards the bankrupt's personal property, whatever he was entitled to at that time or has acquired subsequently (and before he has obtained his certificate), becomes legally vested in his assignees; and as regards his real property, although the legal estate in it only vests in the assignees from the time of their appointment, still they can recover whatever may have been conveyed away by the bankrupt after the commission of any act of bankruptcy subsequent to the accrual of the petitioning creditor's debt (*l*).

(*f*) *Hawkins v. Whitten*, 10 B. & C. 217; *Dickson v. Cass*, 1 B. & Ad. 343.

(*g*) *Dickson v. Cass*, 1 B. & Ad. 343.

(*h*) *Lackington v. Combes*, 6 Bing. N. C. 71; *Fair v. McIver*, 16 East, 130.

(*i*) *Monk v. Sharp*, 2 H. & N. 540; *Stevenson v. Newnham*, 13 C. B. 285. See S. C. as to the right of assignees to impeach fraudulent conveyances made before the petition.

(*k*) *Cooper v. Chitty*, 1 Burr. 20,

and note thereto in 1 Sm. L. C.; *Smith v. Miles*, 1 T. R. 475; *Copland v. Stein*, 8 ib. 199; *Ex parte Birkett*, 2 Ro. 71; *Balme v. Hutton*, 1 Cr. & M. 262, and 9 Bing. 471, reversing S. C., 2 Cr. & J. 19. The same rule was also held to apply to the title of the trustees of a creditor's deed, entered into under the Bankruptcy act, 1861, § 192, after a creditor had presented a petition for adjudication, *Topping v. Keysell*, 16 C. B. N. S. 258.

(*l*) See 1 Griffith and Holmes' Bank. Law, 257, *et seq.*

To this general doctrine there are, however, certain important exceptions to which it is necessary at once to allude. It is enacted by the Bankrupt law consolidation act, 12 & 13 Vict. c. 106, as follows:—

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§ 133. "That all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf (*m*) before the date of the fiat, or the filing of a petition for adjudication of bankruptcy to any creditor of such bankrupt; and all payments really and *bonâ fide* made to any bankrupt before the date of the fiat, or the filing of such petition, and all conveyances by any bankrupt *bonâ fide* made and executed before the date of the fiat, or the filing of such petition; and all contracts, dealings, and transactions, by and with any bankrupt really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition; and all executions and attachments against the lands and tenements of any bankrupt *bonâ fide* executed by seizure; and all executions and attachments (*n*) against the goods and chattels of any bankrupt *bonâ fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed: provided the person so dealing with, or paying to, or being paid by such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed (*o*): provided also that nothing herein contained shall be deemed or taken to give validity to any payment, or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to

Exceptions to
general rule.
12 & 13 Vict. c.
106, § 133.

(*m*) See *Turquand v. Vanderplank*, 10 M. & W. 180.

(*n*) A winding-up order followed by the appointment of an interim manager, was not an execution or attachment within the meaning of this clause, *Aitchison v. Lee*, 3 Drew. 637, 654, &c. See *infra*, note (*p*).

(*o*) If execution issues at the suit of several persons jointly, and one of them has notice of an act of bankruptcy committed by the execution debtor, such notice avoids the execution as against the assignees, *Edwards v. Cooper*, 11 Q. B. 33.

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any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney, or cognovit actionem of judge's order obtained by consent given by any bankrupt by way of fraudulent preference."

12 & 13 Vict. c.
106, § 134.

§ 134. "That no purchase from any bankrupt *bonâ fide* and for valuable consideration, where the purchaser had notice at the time of such purchase, of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless a fiat or petition for adjudication of bankruptcy shall have been sued out or filed within twelve months after such act of bankruptcy."

General rule applies, save in the above excepted cases.

Notwithstanding the protection afforded by the above enactments to persons dealing with, or suing out execution against traders, *bonâ fide*, and without notice of acts of bankruptcy committed by them, the old doctrine of relation applies as rigorously as ever, save in the excepted cases (*p*).

Turquand v.
Vanderplank.

Turquand v. Vanderplank (*q*) illustrates this. In that case, A. and B. were partners, and B. was indebted to the firm. C., a separate creditor of B., issued execution against the partnership assets, and on the same day, A. and B. committed an act of bankruptcy. Afterwards, but before they were adjudged bankrupt, A. paid C.'s demand. It was held, that C. was bound to repay to the assignees what he had received, even though he had no notice of the act of bankruptcy; for his debtor B. being indebted to the firm, he, C., could have got nothing by his execution, and the payment made to him by A. could not be regarded as a payment or as a *bonâ fide* dealing or transaction within the meaning of the preceding enactment. The Court treated the payment as a payment of funds belonging to the assignees, to a person who had no claim upon them.

(*p*) See *Kynaston v. Crouch*, 14 M. & W. 266; *Cannan v. South Eastern Rail. Co.*, 7 Ex. 851. It applied under 7 & 8 Vict. c. 111, on the bankruptcy of companies, *Aitchison v. Lee*, 3 Drew. 637.

(*q*) 10 M. & W. 180. This case was decided on the 6 Geo. 4, c. 16, § 82, and 2 & 3 Vict. c. 29, which are consolidated in, and do not materially differ from, 12 & 13 Vict. c. 106, § 133.

That which is itself an act of bankruptcy, cannot be upheld as a *bonâ fide* payment, dealing, or transaction, within the meaning of the enactment above referred to (*r*).

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Acts of bankruptcy not excepted.

Consequences to partners of doctrine of relation back.

The doctrine of relation back, with its exceptions, having been noticed in a general manner, it is proposed to examine its consequences as regards, first, bankrupt partners and persons dealing with them; secondly, solvent partners and persons dealing with them; and thirdly, creditors who have issued execution against the partnership assets.

Transactions with bankrupt partners.

When a firm is adjudged bankrupt, it is necessarily dissolved, and the power of its members to carry on its business is thereby determined. Moreover, if there has been a joint act of bankruptcy committed by all the partners (*e. g.*, by a conveyance of all their property), the title of the assignees will relate back as against all the partners to that time. But if there has been no joint act of bankruptcy, but each of the partners has committed an act of bankruptcy at a different time from the others, then peculiar difficulties arise; for a certain time having elapsed between the first act of bankruptcy and the next, the *firm* cannot, during this time, be treated as if it had been bankrupt, but only as if one of its members had been so. The consequences, therefore, of an adjudication against a firm, where each member has committed a separate act of bankruptcy at a different time from the others, are, so far as regards transactions with strangers, the same as if there had been a succession of adjudications against each member separately (*s*). What these consequences are, it is now proposed to examine.

Bankruptcy of partners determines their power to deal with the property of the firm.

It has been already pointed out that the bankruptcy of one partner dissolves the firm (*t*). Moreover, when one partner commits an act of bankruptcy, and is adjudged bankrupt, his power of trading and of acting in his own right in the disposition of the partnership, is determined as from the date of the

Bankruptcy of one partner determines his power to deal therewith.

(*r*) See *Bevan v. Nunn*, 9 Bing. 107.

bury, Cowp. 445; *Edwards v. Hooper*, 11 M. & W. 363.

(*s*) See, accordingly, *Fox v. Han-*

(*t*) *Ante*, p. 1100.

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Hague v. Rolleston.

Thomason v. Frere.

act of bankruptcy. Indeed, so far as he is concerned, he may be regarded as a sole trader whose power of dealing with property in his own right ceases on an act of bankruptcy (*u*). On this ground, amongst others, the assignees in *Hague v. Rolleston* (*x*), recovered from a creditor of a firm goods of the firm transferred to him by the bankrupt after he had committed an act of bankruptcy, for the purpose, apparently, of preferring him to other creditors. On the same ground, it was determined in *Thomason v. Frere* (*y*), that the indorsement of a partnership bill by two out of three partners, conferred no title on the indorsee, the indorsement having been made after the two indorsers had committed acts of bankruptcy (*z*). This case is very important, and is a clear authority for the proposition that when a partner becomes bankrupt, all his authorities to bind the firm by dealings in the ordinary course of business, are to be deemed as having been determined by the act of bankruptcy.

Lacy v. Woolcott.

This doctrine, however, must not be carried too far. It has already been seen that persons who hold themselves out as partners, are liable for the acts of each other done in the ordinary course of business, although they may have been done without authority. On this principle, it was held in *Lacy v. Woolcott* (*a*), that a solvent partner was liable to a *bonâ fide* holder of a bill fraudulently accepted in the name of the firm by a co-partner who had previously committed an act of bankruptcy. The case was distinguished from *Thomason v. Frere* on the ground that there the question was whether the property in the bill was in the assignees and the solvent partners, or in the person who had received it from the bankrupt,

(*u*) See *per* Bayley, J., in *Harvey v. Crickett*, 5 M. & S. 341.

(*x*) 4 Burr. 2174. See, too, *Burt v. Moult*, 1 Cr. & M. 525, a similar case.

(*y*) 10 East, 418.

(*z*) See, accordingly, *Burt v. Moult*, 1 Cr. & M. 525. It is said that partnership bills ought in the case of the bankruptcy of one partner, to be indorsed by his assignees

and the solvent partners, see *Abel v. Sutton*, 3 Esp. 108, and *Ramsbottom v. Lewis*, 1 Camp. 279. But it is clear that this is not necessary to enable a *bonâ fide* holder for value without notice to sue on the bill. See *Lacy v. Woolcott*, 2 D. & R. 458; *Ex parte Robinson*, 3 D. & Ch. 376, and C. P. Cooper, Ca. in Ch. temp. Brougham, 162.

(*a*) 2 D. & R. 458.

and that nothing was there decided, or meant to be decided, as to the liability of the firm to an innocent indorsee for value (b). Bk. IV. Chap. 2.
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In conformity with the principle acted upon in *Hague v. Rolleston* and *Thomason v. Frere*, it was held in *Craven v. Edmondson* (c), that where a partner, after he had committed an act of bankruptcy, paid to a creditor, who was aware of that fact, a debt owing to him by the firm, and afterwards the other partners committed acts of bankruptcy, whereupon the firm was adjudged bankrupt, the assignees were entitled to recover back the money so paid. The decision on this case was rested entirely on the ground that the agency of the partner who paid the money was determined by the act of bankruptcy committed by him; whilst the creditor, having had notice of that act, could not avail himself of the statutory enactments relating to *bonâ fide* dealings and payments, and which have been already adverted to. Craven v. Edmondson.

Under the old law, if a debtor to a trader who had committed an act of bankruptcy paid the debt to him, his assignees could compel the debtor to pay them again (d); and this is still the case if the debtor makes the payment after he has notice that an act of bankruptcy has been committed (e). It has nevertheless been held that a trader who has committed an act of bankruptcy can compel his debtors to pay him, so long as he is not in fact adjudicated bankrupt (f). This state of the law is most distressing; for if a debtor knows an act of bankruptcy has been committed by his creditor, and is pressed for payment, if he pays he runs the risk of being compelled by the assignees to pay them again; and if he refuses, he renders himself liable to pay the costs of an action brought against Payments made to bankrupt partner.

(b) In *Ex parte Robinson*, 3 D. & Ch. 376, the firm was held liable on the indorsement of the solvent partner after an act of bankruptcy committed by his co-partner. See the judgment in C. P. Coop. Ca. in Ch. temp. Brougham, 162.

(c) 6 Bing. 734; *Dickson v. Cass*, 1 B. & Ad. 343, was a very similar case, except that the creditor had

not notice of the act of bankruptcy, and he was accordingly protected by statute.

(d) See *Vernon v. Hankey*, 2 T. R. 113.

(e) *Ante*, p. 1114.

(f) *Prickett v. Down*, 3 Camp. 130; *Foster v. Allanson*, 2 T. R. 479.

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him by his creditor. A debtor to a firm, one of the members of which is known to have committed an act of bankruptcy, should therefore pay the solvent partners (*g*).

Transactions with solvent partners.

Effect of bankruptcy of one partner on the solvent partners.

The bankruptcy of any one partner, his co-partners remaining solvent, affects them in no other way than this, viz., that the assignees become tenants in common with them of the partnership property, and are entitled to have the accounts of the partnership taken, and to receive the bankrupt's share, whatever that may be (*h*).

Solvent partners entitled to wind up the business of the firm.

The assignees, as has been already observed, do not become partners in the firm; and unless there be some misconduct on the part of the solvent partners, or unless the solvent partners are dead or abroad, the assignees have no right to interfere in the winding up or management of the partnership business. If they do interfere, a court of equity will restrain them by injunction, at the suit of the solvent partners (*i*). The assignees, moreover, cannot compel the solvent partner to deliver up to them the books of the partnership (*k*). However, in a case where two persons were in partnership as solicitors, and one of them became bankrupt, and his assignees excluded the solvent partner from all interference in the partnership affairs, and got possession of the deeds and documents belonging to the clients of the firm, a motion by the solvent partner for the delivery to him of such deeds and documents was refused, upon the ground that, without the consent of the clients, the Court had no right to order their papers to be delivered to one partner only (*l*).

Assignees have no right to the partnership books.

But they have a right to see them;

But although the assignees of one partner have no right to the custody of the partnership books, the solvent partners can be summoned before the Court, and be compelled to produce

(*g*) Money ordered to be paid to a firm by the Court of Admiralty, is payable to the solvent partners after the bankruptcy of one of the firm; *The Jefferson*, 1 Rob. 325.

(*h*) See *ante*, pp. 661 and 1100.

(*i*) See *Allen v. Kilbre*, 4 Madd.

464.

(*k*) *Ex parte Finch*, 1 D. & Ch. 274.

(*l*) *Davidson v. Napier*, 1 Sim. 297. Surely the solvent partner has more right to them than the assignees.

them, and to answer questions relative to the dealings of the bankrupt (*m*), although it may not even be alleged that there is anything due to him from the firm (*n*). Bk. IV. Chap. 2.
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The assignees have power, with the leave of the Court, to bring actions in the name of themselves and of the solvent partners; indemnifying the latter, however, against costs, if their names are used only for the sake of form, and they claim no benefit from the action (*o*). So the solvent partners may use the names of the assignees, upon indemnifying them if they decline to take any active part in the proceedings (*p*). and to bring
actions to re-
cover partner-
ship debts.

If disputes as to the management of the partnership affairs arise between the assignees and the solvent partners, and there is no reason for distrusting the latter, the Court of Bankruptcy will appoint one of them receiver of the partnership property, directing him to give security, to pass his accounts, and to furnish the assignees with proper accounts, and to allow them at all reasonable times to inspect the partnership books (*q*). Solvent partner
will be appointed
receiver.

The power of the solvent partners to wind up the affairs of the partnership is, however, personal to themselves, and arises from the confidence originally placed in them by the bankrupt, and which is continued to be placed in them by the Court so long as there is no reason to the contrary. The right cannot be transferred; and therefore, where partnership goods were seized by the sheriff under an execution against a solvent partner, and the execution creditor purchased from the sheriff all the execution debtor's share and interest in the partnership, and then proceeded to sell the partnership effects, an injunction restraining such sale was granted by the Court of Chancery, at the suit of the assignees of the other partner, who was bankrupt (*r*). Assignees en-
titled to wind up
the affairs of the
firm, except as
against the sol-
vent partners.

(*m*) *Ex parte Trueman*, 1 D. & C. 464.

(*n*) *Ex parte Levett*, 1 Gl. & J. 185.

(*o*) See 12 & 13 Vict. c. 106, § 152. See *Ex parte Wilson*, 2 Deac. 387, and 3 M. & A. 219, as to general orders authorising assignees to sue.

(*p*) *Whitehead v. Hughes*, 2 Cr. & M. 318, and 2 Dowl. Pr. Ca. 258, and 4 Tyr. 92.

(*q*) See *Ex parte Stoveld*, 1 Gl. & J. 303; *Freeland v. Stansfeld*, 2 Sm. & G. 479.

(*r*) *Fraser v. Kershaw*, 2 K. & J. 496.

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If there is only one partner living in this country, his co-partners being either dead or abroad, and he becomes bankrupt, the assignees in that case wind up the affairs of the partnership as well as the private affairs of the bankrupt (s).

Sales, &c., by
solvent partners.

It being established that by the adjudication of bankruptcy against one partner the firm is dissolved, that the assignees of the bankrupt partner become tenants in common of the partnership effects with the solvent partners, and further, that the title of the assignees as such tenants in common dates from the act of bankruptcy committed by the bankrupt, it might naturally have been expected that the assignees would, in some way or other, have been able to recover the bankrupt's interest in such of the partnership effects as might have been parted with since that time (t). It is true that this would have been very hard against *bonâ fide* purchasers, but it would not have been more hard than other well-established consequences of the doctrine of relation. Fortunately, however, it has long been held that the assignees of a bankrupt partner have no *locus standi* against a *bonâ fide* purchaser from the solvent partners (u). This has been established by a series of decisions at law, the authority of which cannot be questioned. In

Fox v. Hanbury. *Fox v. Hanbury* (x), the leading case on the subject, one of several partners became bankrupt; afterwards, partnership goods were *bonâ fide* sold to the defendant by the solvent partners, and after the sale the firm was adjudged bankrupt; the assignees of the firm sought to recover the goods from the purchaser, upon the ground that by the bankruptcy of one of the partners the firm was dissolved, and the solvent partners had no power afterwards to dispose of the partnership effects. Lord Mansfield, in a most carefully considered judgment, held

(s) See *Hankey v. Garratt*, 1 Ves. J. 236; *Everett v. Backhouse*, 10 Ves. 98; *Barker v. Goodair*, 11 Ves. 86; *Dutton v. Morrison*, 17 Ves. 210.

(t) Accordingly in *Whitwell v. Thompson*, 1 Esp. 68, which was an action by the assignees of one partner to recover deeds deposited by him and his co-partner as a security

for a partnership debt, Lord Kenyon held that the defendant was entitled to retain the deeds subject to the claim of the assignees to one moiety of the property to which they related.

(u) *Sed quære* if they are only partners in the profits, see *Meyer v. Sharpe*, 5 Taunt. 74.

(x) Cowp. 445.

that the action would not lie; and for two reasons, viz., first, upon the broad ground that, after a partnership has been dissolved by the bankruptcy of one partner, persons who deal with the other partners without notice of the dissolution, acquire a right against the solvent partners and the assignees of the bankrupt partner; and secondly, upon the technical ground that the assignees could not claim to be more than tenants in common with the purchaser, and that *trover* would not lie at the suit of one tenant in common against his co-tenant, unless under very special circumstances.

In *Smith v. Stokes* (y), an action was brought by the assignees of one partner, who was bankrupt, against a purchaser from the solvent partner, and it was held that the action did not lie, because the most that could be said for the plaintiffs was, that they and the defendant were tenants in common.

Smith v. Oriell (z), which was a somewhat similar case, was decided in the same way, and apparently upon the same ground.

In *Harvey v. Crickett* (a), which was not an action of *trover*, but *assumpsit for money had and received*, the plaintiffs, as assignees of a bankrupt partner, sought to recover from the defendants, creditors of the firm, money paid to them by the solvent partner after the act of bankruptcy; but it was held that the action would not lie; not, however, because the plaintiffs and the defendant were tenants in common, but because, notwithstanding the bankruptcy of one of the partners, the other was entitled to apply the partnership assets in payment of the partnership debts.

Again, in *Morgan v. Marquis* (b), the assignees of a bankrupt partner sought to recover from the agent of the firm monies received by him from the sale of goods effected by him after the bankruptcy, by the desire of the solvent partner; but it was held that the action would not lie, because it was competent

(y) 1 East, 363.

(z) 1 East, 368.

(a) 5 M. & S. 336. *Woodbridge v. Swann*, 4 B. & Ad. 633, and *Smith v. Goddard*, 3 Bos. & P. 465, are nearly similar cases, and in them there was notice of the bank-

ruptcy.

(b) 9 Ex. 145. See, also, *Lewis v. White*, 2 New R. 81, Ex., where the assignees sued an auctioneer in *trover* for partnership property sold by the orders of the solvent partners.

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Principle and
effect of forego-
ing cases.

for the solvent partner to deal with the property as he had done.

These cases have been referred to thus in detail, in order to show that they rest on something more satisfactory than the technical doctrine that trover will not lie by one tenant in common against the other. Although this doctrine was, no doubt, sufficient for the decision of *Fox v. Hanbury*, *Smith v. Stokes*, and *Smith v. Oriell*, and was apparently thought by the Court of Exchequer, in *Buckley v. Barber* (c), to afford the only reason by which those decisions could be justified, yet it is submitted that those cases, together with the others just referred to, are, in fact, authorities for the proposition that, notwithstanding the bankruptcy of one partner, the solvent partners can deal with the partnership property as if no bankruptcy had intervened, and can consequently confer a title, not only to an undivided share in, but to the whole of, any of the property which they assume to dispose of in the ordinary way of business, and to persons dealing with them *bonâ fide* (d).

Ex parte Robin-
son.

The case of *Ex parte Robinson* (e) goes the whole length of the doctrine here contended for. There A. and B. were partners. A. committed an act of bankruptcy, and afterwards B. accepted bills in the name of the firm, as a security for a previously contracted obligation. On the subsequent bankruptcy of B. it was held that the holders of these bills were entitled to prove against the joint estate of A. and B.; for, as between the firm and *bonâ fide* holders of the bills for value, B.'s authority to accept them for himself and co-partner, and for a partnership debt, could not be disputed.

Bill accepted in
name of firm
after its bank-

But although a bill accepted by one partner in the name of

(c) 6 Ex. 182.

(d) See, accordingly, *Fraser v. Kershaw*, 2 K. & J. 496. See, also, *Tupper v. Haythorne*, before Sir Wm. Grant, and reported in a note in Gow, N. P. Rep. 135. See further on this subject generally, note 2 M. at p. 133 of the Appendix to 1 Mont. Part.

(e) 3 D. & Ch. 376, and 1 Mon. &

A. 18, reversing *Ex parte Ellis*, Mon. & Bl. 249. *Ramsbottom v. Duck*, 1 Mont. Part. App. note 2 M.; *Ramsbotham v. Cator*, 1 Stark. 228; *Ramsbottom v. Lewis*, 1 Camp. 279; and *Abel v. Sutton*, 3 Esp. 108, must be considered as overruled so far as they are inconsistent with the case in the text.

the firm, and after the bankruptcy of one of its members is the bill of the firm, it is obviously a very different thing from the bill of a firm in which all the partners are solvent; and an agreement to exchange bills of a firm for something else, is not performed by the delivery of bills of the firm, after some or one of its members are bankrupt. This was the ground of decision in *Ex parte McGae* (f). There A., B. and C. were bankers; D., a customer of the bank, was in the habit of receiving bills from various people; and it was agreed between him and the bank, that he should indorse and pay the bills into the bank, and receive in exchange its notes. This agreement was acted on. A. and B. became bankrupt; but D., without knowledge of that fact, continued to pay in bills, and to receive the notes of the bank. Afterwards C. became bankrupt; a joint adjudication was made against A., B. and C. It was held that their assignees were bound to return to D. the bills paid in by him since the bankruptcy of A. and B.; for although he had received notes for such bills, those notes were not such notes as he had stipulated for, and was entitled to: they were notes, not of A., B. and C., but, in substance, of C. and the assignees of A. and B.

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ruptcy not bills
of the firm for
all purposes.

Ex parte McGae.

It will have been observed, that the validity of *bonâ fide* dealings of solvent partners after the bankruptcy of their co-partners, does not depend on the clause in the Bankrupt act relating to *bonâ fide* dealings and transactions with bankrupts, without notice of any act of bankruptcy committed by them. That clause increases, but is not essential to the safety of persons *bonâ fide* dealing with partners who have committed no act of bankruptcy. *Harvey v. Crickett* (g) and *Woodbridge v. Swann* (h) are conclusive on this head.

Validity of acts
of solvent part-
ners not depend-
ent on absence of
notice of bank-
ruptcy.

Execution creditors.

Subject to the qualifications introduced by the enactment already referred to, the title of an execution creditor is always liable to be overridden by the commission of an act of bankruptcy on the part of the debtor, before the goods taken in

Conflicting rights
of assignees and
execution cre-
ditors.

(f) 19 Ves. 606. See, too, *Jombart v. Woollett*, 2 M. & Cr. 389.

(g) 5 M. & S. 336.

(h) 4 B. & Ad. 633.

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execution are actually sold (*i*). This doctrine applies as well to cases where one partner is bankrupt, and the same partner is the execution debtor, as to those where all the partners are bankrupt, and all are execution debtors (*k*). Some difficulty, however, arises where one partner only is bankrupt, and the execution is against the firm for a partnership debt. In such a case, according to the principles stated above, the title of the execution creditor ought to prevail as to the shares of the solvent partners, although it might not prevail against the assignees of the bankrupt partner, so far as his share is concerned (*l*). But, inasmuch as by the bankruptcy of one partner, the firm is dissolved as from the date of the act of bankruptcy, and the right of the assignees is to have the assets of the firm duly distributed, as they ought then to have been distributed; and further, inasmuch as due distribution of the partnership assets is held to be a rateable distribution amongst all the creditors of the firm, it has been held that no execution against its effects ought to be allowed after the time above mentioned (*m*). This is shown by *Barker v. Goodair*, *Dutton v. Morrison*, and *Re Wait*.

Barker v.
Goodair.

In *Barker v. Goodair* (*n*) there were two partners, one of whom was abroad. The partner in this country committed an act of bankruptcy, upon which he was afterwards adjudged bankrupt under a separate commission. In the interval between the act of bankruptcy and the adjudication, a creditor of the firm, by process of foreign attachment, attached the goods of the firm and was about to sell them, in order to satisfy his debt. On a bill, filed by the assignees, Lord Eldon ordered the goods to be sold, and the produce of the sale to be paid into court, subject to the questions in the cause. The further proceedings are not reported.

Dutton v. Mor-
rison.

Dutton v. Morrison (*o*) was a very similar case, and it was

(*i*) See *Cooper v. Chitty*, 1 Smith, L. C., and the note there.

(*k*) See the judgments in *Barker v. Goodair*, 11 Ves. 78, and *Dutton v. Morrison*, 17 Ves. 210. See, too, *Anon.*, 12 Mod. 446.

(*l*) *Ibid.*

(*m*) See the judgments in *Dutton*

v. Morrison, 1 Rose, 213, and *Re Wait*, 1 J. & W. 610.

(*n*) 11 Ves. 78. *Bristowe v. Potts*, cited 11 Ves. 81, note, must be considered as overruled by the cases noticed in the text.

(*o*) 17 Ves. 193, and 1 Rose, 213.

there held that execution creditors of the firm could not be allowed to go on with their executions, and that the property taken by them ought to be applied by the assignees amongst all the creditors of the firm, as if the firm itself had been bankrupt.

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In *Re Wait* (p) the circumstances were much the same as in the two preceding cases, and it was again decided that property of the firm, taken in execution by a joint creditor, after the commission of an act of bankruptcy by one of the partners, could not be retained by the execution creditors, but was distributable amongst the creditors of the firm rateably, according to the principles which will be hereafter explained.

Re Wait.

In *Barker v. Goodair* and *Dutton v. Morrison*, the reader will have observed, that the only partner in this country was bankrupt; the solvent partners were abroad; and consequently the assignees of the one bankrupt partner were the proper persons to wind up the affairs of the partnership. Under these circumstances, the assignees in both these cases, in fact, represented the general body of the creditors of the firm; and the question was substantially the same as if the firm had been bankrupt; in which case, of course, no creditor would be allowed to take, for his own exclusive benefit, any part of the fund which it is the object of the bankrupt laws to have distributed amongst all the creditors *pro rata*. In *Re Wait* it does not appear whether the solvent partner was in this country or not. But, even if he was, that circumstance could not affect the right of the bankrupt's assignees to have the affairs of the partnership wound up, as they would have been wound up on the day to which their title related back, if there had been time then to have taken the proper accounts, and to have distributed the assets of the firm according to the principles which obtain in bankruptcy.

Observations on
foregoing cases.

The principles upon which the above cases were decided, can only be applied where the Court is in a position to ensure a proper distribution of the assets of the firm amongst the creditors thereof. Therefore, if a firm carries on business,

Case where some
partners are
abroad.

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and has property abroad, and some of the partners are resident there, and a creditor has, by proceedings instituted abroad against the foreign house, taken its effects there in execution, he will not be interfered with by the courts here, at the instance of the assignees of a bankrupt member of the firm residing in this country (*q*). As the Court in such a case cannot ensure a proper distribution of the partnership assets amongst all the creditors of the firm, it will not deprive any of those creditors of the advantages which they may have obtained, and to which they are entitled by the laws of another country. If, however, the creditor has received more than the amount of his debt, he will be made to account to the assignees for the difference (*r*).

Right of assignees to part of proceeds of sale under execution.

Courts of law, looking only to the legal rights of the assignees on the one hand, and to the legal rights of the execution creditor on the other, hold that where A. and B. are partners, and A. has committed an act of bankruptcy, and a separate creditor of B. has taken the partnership property in execution, and sold it, A.'s assignees, although not entitled to recover the property sold, or its value, are entitled to part of the proceeds of its sale; and, in the absence of evidence to the contrary, to one-half of such proceeds (*s*). If, however, the assignees of a firm sell its property, a creditor who has previously issued execution against that property for a separate debt of one of the partners, cannot sue the assignees for that partner's share of the proceeds of the sale (*t*).

SECTION III.—OF THE DOCTRINE OF REPUTED OWNERSHIP.

1. Generally.

Reputed ownership.

From the time of James the First, and since, it has been thought proper by the Legislature to declare that upon the

(*q*) See *Brickwood v. Miller*, 3 Mer. 279. See, too, the excellent judgment of C. J. Eyre, in *Phillips v. Hunter*, 2 H. Bl. 410, and the case of *Waring v. Knight*, referred to by him,

(*r*) *Brickwood v. Miller*, 3 Mer. 284.

(*s*) *Mayhew v. Herrick*, 7 C. B. 229. Compare *Morgan v. Marquis*, 9 Ex. 145.

(*t*) *Garbett v. Veale*, 5 Q. B. 408.

bankruptcy of any person his assignees shall become entitled for the benefit of his creditors, not only to his own property but to all such goods of other people as at the time of his bankruptcy were in his possession, order, and disposition, with their permission. By the Bankrupt law consolidation act of 1849 (*u*) it is enacted—

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“That if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy” (*x*). The act then contains a proviso that nothing therein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof made as a security for any debt or debts either by way of mortgage or assignment duly registered. It will be observed that such property does not, like the bankrupt's own property, *vest* in the assignees; but the order, when made, is retrospective, and enables them or the purchaser from them, as the case may be, to sue for the goods (*y*).

12 & 13 Vict. c.
106, § 125.

The object of the above enactment is to prevent a trader from obtaining undue credit by being allowed to parade as his own, property which in point of fact belongs to other people; and notwithstanding the very general language of the enactment, its application is always controlled by a reference to the mischief which it is designed to prevent; and as the habits of the trading community vary, it may well happen that circumstances which are at one time calculated to deceive are not so at another. Whether, therefore, property in the posses-

Object of above
enactment.

(*u*) 12 & 13 Vict. c. 106, § 125. The former enactments were 21 Jac. 1, c. 19, § 11, and 6 Geo. 4, c. 16, § 72.

(*x*) See *Heslop v. Baker*, 6 Ex. 740.

(*y*) *Ib.* The order may be made retrospectively, as in *Re Heslop*, 1 De G. Mac. & G. 477. See, as to

the order for sale, *Quartermaine v. Brittlestone*, 13 C. B. 133; *Freshney v. Carrick*, 1 H. & N. 653; and as to its conclusiveness, *Graham v. Furber*, 14 C. B. 134; *Ex parte Carrick*, 4 De G. Mac. & G. 861; and as to restraining a sale under it, *Mather v. Lay*, 2 J. & H. 374.

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General rule
as to reputed
ownership.

sion of a bankrupt, but not belonging to him, will pass to his assignees by virtue of the doctrine of reputed ownership, will depend upon the circumstances under which, and the purposes for which, they are in his possession (z).

Before proceeding to examine the doctrine in question with special reference to partners, it will be convenient to allude shortly to a few general rules founded on the enactment above set out. An examination of that enactment will suffice to show—

1. That the doctrine of reputed ownership extends only to goods and chattels ;
2. That the bankrupt must have had them in his order and disposition as reputed owner ;
3. That he must so have had them at the time he became bankrupt ; and
4. That he must so have had them with the consent of the true owner.

1. Property must
be personal.

First, as to the property.—The reputed-ownership clause extends to pure personalty of every description; *e. g.*, to debts (*a*), negotiable instruments (*b*), policies of insurance (*c*), ships, notwithstanding the registry acts (*d*), shares in newspapers (*e*), shares in companies (*f*). But it does not extend to land or any interest therein; and not therefore to leaseholds (*g*), equities of redemption or the like (*h*); nor to fixtures, even though removable as between landlord and tenant (*i*).

(z) See *Priestley v. Pratt*, L. R. 2 Ex. 101; *Ryall v. Rowles*, 1 Ves. S. 348; *Joy v. Campbell*, 1 Sch. & Lef. 328; *Hamilton v. Bell*, 10 Ex. 545; *Horn v. Baker*, 9 East, 215, and 2 Sm. L. C.

(a) *Ryall v. Rowles*, 1 Ves. S. 348.

(b) *Hornblower v. Proud*, 2 B. & A. 329.

(c) *Edwards v. Martin*, L. R. 1 Eq. 121; *Re Webb's policy*, 2 Weekly N. 101; *Ex parte Styant*, 2 M. D. & D. 219; *Thompson v. Spiers*, 13 Sim. 469; *Ex parte Bromley*, ib. 475.

(d) *Monkhouse v. Hay*, 2 Brod. & Bing. 114, affirming *Hay v.*

Fairbairn, 2 B. & A. 193; *Robinson v. McDonnell*, 5 M. & S. 228; *Ex parte Burn*, 1 Jac. & W. 378; *Ex parte Batson*, Cooke's Bank. L. 355, ed. 8.

(e) *Longman v. Tripp*, 2 Bos. & P. N. S. 67; *Ex parte Foss*, 2 De G. & J. 230.

(f) *Nelson v. London Ass. Co.*, 2 Sim. & Stu. 292; *Ex parte Nutting*, 2 M. D. & D. 302; *infra*.

(g) *Roe v. Galliers*, 2 T. R. 133.

(h) *Jones v. Gibbons*, 9 Ves. 407. But as to money directed to be raised by sale or mortgage, see *Re Hughes*, 2 Hem. & M. 89.

(i) *Horn v. Baker*, 9 East, 215, and 2 Sm. L. C.; *Whitmore v. Emp-*

Whether shares in partnerships and companies having real estate are within the reputed-ownership clause has not been much discussed. In *Ex parte Taylor* (*k*) it was held that a partner's interest in land mortgaged to the firm to secure a partnership debt did not fall within the clause; and in *Ex parte The Vauxhall Bridge Company* (*l*), it was held that shares in that company were not goods and chattels within the meaning of the clause in question. This case, however, cannot be supported, for shares in the Vauxhall Bridge Company are declared to be personal estate by act of Parliament (*m*); and it has frequently been decided of late years that shares declared to be personal estate are within the clause relating to reputed ownership (*n*), whatever may be the case with shares in companies entitled to real estate, and the nature of which shares is not settled by express declaration. Whether such shares are to be regarded as within the clause has never yet been actually decided, and this question must therefore be considered as still open to doubt. In *Ex parte Richardson* (*o*), however, the Court expressed an opinion that shares in the German Mining Company were within the clause, although it does not appear that such shares were declared to be personal estate.

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As to shares in companies having real estate.
Ex parte Taylor.

Ex parte Vauxhall Bridge Company.

Ex parte Richardson.

Before leaving this subject it may be observed, that shares which are in the reputed ownership of a bankrupt can only be sold by the assignees subject to the lien of the company upon them (*p*); unless indeed, notwithstanding the lien, the bankrupt can sell or dispose of them without the consent of the company (*q*).

Lien of company.

Secondly, as to the order and disposition.—The act requires

son, 23 Beav. 313; *Mather v. Fraser*, 2 K. & J. 536; *Ex parte Scarth*, 1 M. D. & D. 240; *Ex parte Cotton*, 2 ib. 725; *Boydell v. McMichael*, 1 Cr. M. & R. 177; *Ex parte Wilson*, 4 D. & C. 143.

(*k*) Mont. 244.

(*l*) Gl. & J. 101.

(*m*) See Mon. 118.

(*n*) *Ex parte Lancaster Canal Co.*, Mon. 116, and Mon. & Bl. 94;

Ex parte Lawrence, De Gex, 269; *Ex parte Vallance*, 2 Deac. 354; *Ex parte Boulton*, 1 De G. & J. 163.

(*o*) 3 Deac. 496.

(*p*) *Ex parte Plant*, 4 D. & C. 160.

(*q*) Compare *Nelson v. London Ass. Co.*, 2 Sim. & S. 292, with the last case.

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2. Property
must be in the
order or disposi-
tion of the bank-
rupt.

that the goods and chattels shall be in the bankrupt's possession, order, or disposition as reputed owner, or that he shall have taken upon himself the sale, alteration, or disposition thereof as owner. Goods therefore which are in the bankrupt's possession, but not as reputed owner, are not within the clause (r). On the other hand, actual possession on the part of the bankrupt is not necessary. If the goods are in the hands of a servant of the bankrupt or in the possession of a third party, to whom the bankrupt has lent them, and who is bound to return them when required, they are in the bankrupt's order and disposition (s). But if goods are in the possession of a third party who is entitled to a lien upon them, the assignees are not entitled to the goods as being in the bankrupt's possession (t).

Nor does the registration of a bill of sale prevent the goods comprised in it from remaining in the order and disposition of the vendor or mortgagor (u).

As to choses in
action.

Debts, shares, policies, and other things of that sort are deemed to be in the possession, order, and disposition of him who has the power of giving a valid discharge for the money payable in respect of them, and of transferring them in the market without exciting suspicion. Consequently a mere assignment of debts, shares, or policies, although it may be valid enough between the assignor and the assignee, will not have the effect of taking them out of the order and disposition of the former. To effect this, notice of the assignment must be given, to the debtor in the case of debts (x), and to the company in the case of shares (y) and policies (z).

(r) See *Priestley v. Pratt*, L. R. 2 Ex. 101, where the goods were left with the bankrupt for the owner's convenience. See, also, *Shrubsole v. Sussams*, 16 C. B. N. S. 452, where the bankrupt's name had been painted out from over his own shop.

(s) *Hornsby v. Miller*, 1 E. & E. 192.

(t) See *Greening v. Clarke*, 4 B. & C. 316; *Ex parte Taylor*, Mont. 240; and compare *Hoggard v. Mackenzie*, 25 Beav. 493, where the person setting up the lien was only a

servant of the bankrupts.

(u) *Badger v. Shaw*, 2 E. & E. 472; *Stanfeld v. Cubitt*, 2 De G. & J. 222.

(x) *Ryall v. Rowles*, 1 Ves. S. 348; *Ex parte Monro*, Buck, 300.

(y) *Ex parte Lancaster Canal Co.*, Mont. 116, and Mont. & Bl. 94; *Ex parte Vallance*, 3 M. & A. 224; *Ex parte Spencer*, ib. 397; *Ex parte Masterman*, 4 D. & Ch. 751, and the cases noticed *infra* in the text.

(z) *Webb's Policy*, 2 Weekly N. 101; *Ex parte Arkwright*, 3 M. D.

Ex parte Wood (a) is a strong illustration of this rule. There a policy of insurance effected by A. was assigned by him to B., and was pledged by B. to C. The insurance office had no notice either of the assignment or of the pledge; and B. having become bankrupt the policy was held to be in his order and disposition.

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Ex parte Wood.

So in the case of shares. In *Ex parte Nutting* (b), a director of a company mortgaged his shares, but stipulated that notice of the mortgage should not be given to the company, and accordingly no notice was given. On the bankruptcy of the director the shares were held to be in his order and disposition.

Ex parte Nutting.

So in *Ex parte Boulton* (c), the secretary of a railway company deposited the certificates of his shares as a security for a loan and became bankrupt. No notice of the deposit having been given to the company, his assignees were held entitled to the shares.

Ex parte Boulton.

On the other hand, where shares are transferred or assigned or deposited as security for money, and notice of the transaction is given to the company, they are thereby taken out of the reputed ownership of the person transferring, assigning, or depositing them.

Effect of notice of assignment.

In *Ex parte Littledale* (d), A. lent B. money in order that he might buy shares and qualify himself to be a director of a company. B. bought the shares and assigned them to A. as a security for his loan, and A., shortly before B.'s bankruptcy, gave notice of the assignment to the company. It was held that B.'s assignees had no title to these shares, although A. had for some time allowed B. to continue and act as the apparent owner of them, and B. would have been disqualified from being a director had the assignment of his shares been known to the company.

Ex parte Littledale.

In *Morris v. Cannan* (e), a person was entitled to shares in a

Morris v. Cannan.

& D. 143; *Williams v. Thorp*, 2 the second mortgage.
Sim. 257; *Ex parte Tennyson*, (b) 2 M. D. & D. 302.
Mont. & Bl. 67. (c) 1 De G. & J. 163. Compare
(a) 3 M. D. & D. 315. Compare *Re Shelley*, 5 N. R. 200, L. C.
Ex parte Barnett, De Gex, 194, (d) 6 De G. Mac. & G. 714.
where the company had notice of (e) 8 Jur. N. S. 653.

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company governed by 7 & 8 Vict. c. 110, but he was not registered as their owner, nor had he executed the company's deed of settlement. He sold the shares through a broker, and executed transfers in blank, which transfers were, with the certificates of the shares, handed over to the purchaser. The transfers were taken to the office of the company, and a note of the transfer was made by the secretary, and he indorsed upon them a memorandum to the effect that the certificates were at the office. The vendor shortly afterwards became bankrupt; and it was held by Lord Westbury (reversing the decision of the V.-C. Stuart) that the shares were not in the order and disposition of the bankrupt, although the purchaser was not registered as their holder in the books of the company.

This case amongst others shows that if a shareholder in a company so deals with his shares as to confer a lien upon them in favour of a third person, and the company has notice of such dealing, the shares are taken out of the order and disposition of the shareholder, although they continue registered in his name (*f*).

Effect of declining to attend to notice.

Even if the company declines to recognise trusts or to attend to the notice, the result will be the same: for the notice by the assignee prevents the shares from being in the order and disposition of the assignor with the consent of the true owner, *i.e.*, the assignee. Accordingly it has frequently been held that an assignment of a policy of insurance, notified to the office, takes the policy out of the reputed ownership of the assignor, although the office may decline to recognise the assignment or to attend to the notice (*g*); and the same rule applies to shares in companies (*h*).

As to the sufficiency of the notice.

What amounts to a sufficient notice of an assignment is often not easy to decide. It seems, however, that it is immaterial by whom the notice is given (*i*); that a verbal communication is as effectual as a written notice (*k*); and that notice to one

(*f*) See, too, *Ex parte Masterman*, 4 D. & C. 751.

(*g*) *Williams v. Thorp*, 2 Sim. 257; *Ex parte Tennyson*, Mon. & Bl. 67; *Ex parte Patch*, 7 Jur. 820. But see *Ex parte Burbridge*, 1 Deac.

131.

(*h*) *Re Shelley*, 5 N. R. 200, L. C.

(*i*) See *Re Rawbone*, 3 K. & J. 300; *Re Langmead*, 20 Beav. 20.

(*k*) *North British Insur. Co. v. Hallett*, 7 Jur. N. S. 1263, M. R.;

director or officer of a company is notice to the company (*l*), provided such director or officer is not the person whose interest in the company is the subject-matter of the transaction to be notified (*m*). In *Duncan v. Chamberlayne* (*n*), indeed, it was held that the mere assignment of a policy in a mutual assurance office took the policy out of the reputed ownership of the assignor, inasmuch as notice to him was notice to the office; but this case has been expressly overruled (*o*).

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Case of mutual
Insurance So-
cieties.

*Duncan v. Cham-
berlayne.*

Where, however, a shareholder pledges his shares to a director, without whose consent they cannot be transferred, it seems that the shares cease to be in the order and disposition of the shareholder, although the company has no other notice of the pledge than that which is imputable to it by reason of the knowledge of the director in question (*p*).

Where a director
is assignee.

If the same person is an officer of two companies, it is at least doubtful whether notice to him is notice to both companies, without reference to the character in which he received the notice (*q*).

Where same
person to whom
notice is given is
a director of two
companies.

Notice of a dissolution of partnership, and that one of the partners will receive and pay all debts, is not notice that he alone is entitled to receive payment of the debts due to the firm, and is therefore insufficient to take such debts out of the reputed ownership of the firm (*r*).

Notice of disso-
lution of part-
nership.

Re Shelley, 5 New R. 200, L. C.;
Ex parte Richardson, M. & Ch. 43;
Gale v. Lewis, 9 Q. B. 730. Com-
pare *Re Barr's Trust*, 4 K. & J.
219, and *Ex parte Burbridge*, 1
Deac. 131. Mere casual knowledge
by a secretary is however not
enough, *Edwards v. Martin*, L. R.
1 Eq. 121.

(*l*) *Browne v. Savage*, 4 Drew.
635; *Ex parte Richardson*, M. & Ch.
43; *Gale v. Lewis*, 1 Q. B. 730;
Ex parte Bignold, 3 Deac. 151;
Pinkett v. Wright, 2 Ha. 120. See
Ex parte Burbridge, 1 Deac. 131.

(*m*) *Browne v. Savage*, 4 Drew.
635; *Ex parte Nutting*, 2 M. D. &
D. 302; *Ex parte Boulton*, 1 De G.

& J. 163. Compare *Re Shelley*, 5
New R. 200, L. C.

(*n*) 11 Sim. 123.

(*o*) *Thompson v. Spiers*, 13 Sim.
469; *Ex parte Wilkinson*, ib. 475;
Webb's policy, 2 Weekly N. 101. *Ex
parte Rose*, 2 M. D. & D. 131, must
also be considered overruled.

(*p*) *Ex parte Harrison*, 3 M. & A.
506.

(*q*) *Ex parte Bignold*, 3 Deac.
151.

(*r*) *Ex parte Burton*, 1 Gl. & J.
207; *Ex parte Usborne*, ib. 358; *Ex
parte Sprague*, 4 De G. Mac. & G.
866. Compare *Ex parte Woodgate*,
1 M. D. & D. 394.

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Effect of deposits
without notice.

Notwithstanding the cases which have been referred to for the purpose of showing the necessity of notice in the case of assignments of shares and policies, it is held at law, that if a policy is actually deposited by a trader with a creditor, and remains in the creditor's possession, and the trader becomes bankrupt, his assignees cannot recover the policy from the holder without satisfying his lien upon it, although no notice of the deposit may have been given to the company (s). But the right of the assignees to the document deposited, is distinct from their right to that which the document represents; and although the former may not be in a bankrupt's order and disposition, he may nevertheless be the reputed owner of the latter. Whether a trader who deposits policies or share certificates with a creditor as a security for a debt, is, so long as no notice of the deposit is given, necessarily to be considered as the reputed owner of that which the policies or certificates represent, is perhaps still open to some doubt. But the tendency of courts of bankruptcy is strongly in favour of holding the reputed-ownership clause applicable in such a case (t).

3. Property must
be in possession
of bankrupt at
the time of his
bankruptcy.

Thirdly, as to the time of possession.—The reputed-ownership clause only extends to goods and chattels in the bankrupt's order and disposition at the time of the commission of the act of bankruptcy to which the adjudication relates. Therefore, although such property may have been left in the bankrupt's order and disposition for a long time, and although he may thereby have acquired a false credit, still, if before he has committed an act of bankruptcy, they have been taken out of his order and disposition, his assignees will have no claim to them. *Ex parte Littledale* (u) and *Ex parte Masterman* (x),

(s) *Broadbent v. Varley*, 12 C. B. N. S. 214; *Gibson v. Overbury*, 7 M. & W. 555.

(t) See, *inter alia*, *Ex parte Monro*, Buck, 300; *Ex parte Colville*, Mont. 110, and affirmed under the name *Ex parte Tennyson*, Mon. & Bl. 67; *Ex parte Boulton*, 1 De Gex & J. 163, and *Ex parte Nutting*, 2 M. D. & D. 302, in all of which debts;

policies, or shares were held to be in the order and disposition of a bankrupt who had pledged them and deposited the document showing his title to them; and see *contra*, *Ex parte Cooper*, 2 M. D. & D. 1; *Ex parte Smith*, ib. 213; and *Ex parte Pooley*, ib. 505.

(u) 6 De G. Mac. & G. 714.

(x) 4 D. & Ch. 751.

which have already been referred to, illustrate this. In each of those cases, shares were pledged to a person who deferred giving notice to the company until the last moment; but notice having been given before the commission of any act of bankruptcy by the debtor, the assignees' title was destroyed (*y*).

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So, in the case of ordinary goods, if they are removed from the possession and control of the bankrupt before the time in question, his assignees have no claim to them by virtue of the doctrines of reputed ownership (*z*). In a case where the goods of one partner were in the order and disposition of the firm, but were insured in the name of their owner, and the goods were burnt, and afterwards the firm became bankrupt, the proceeds of the policy were held not to form part of the joint estate of the firm, although the goods themselves would have done so had they continued undestroyed (*a*).

The effect of removing goods from the order and disposition of a bankrupt after he has committed an act of bankruptcy, turns on the *bona fides* of their owner, and on his knowledge or ignorance of the act of bankruptcy; for it is held that a removal of goods is a dealing or transaction within the meaning of the 12 & 13 Vict. c. 106, § 133 (*b*). Consequently, although a person's goods and chattels may be with his consent in the order and disposition of a trader who commits an act of bankruptcy, yet, if such person afterwards, *bona fide* and without notice of such act of bankruptcy, takes those goods out of the trader's order and disposition, they will be protected from the claims of his assignees (*c*).

Bonâ fide dealings without notice of bankruptcy.

Fourthly, as to the consent of the true owner.—Goods and chattels which, at the time of the commission of an act of bank-

4. Property must be in bankrupt's possession with the consent of the true owner.

(*y*) See, also, *Morris v. Cannan*, noticed *ante*, p. 1131.

Browne, 6 Ves. 136; *Ex parte Parry*, 5 ib. 575.

(*z*) *Stansfeld v. Cubitt*, 2 De G. & J. 222; *Jones v. Dwyer*, 15 East, 21; *Smith v. Topping*, 5 B. & Ad. 674; *Price v. Groom*, 2 Ex. 542; *Ex parte Foss*, 2 De G. & J. 230; *Sinclair v. Wilson*, 20 Beav. 324.

(*b*) As to which, see *ante*, p. 1113.

(*c*) *Re Styant*, 1 Ph. 105; *Graham v. Furber*, 14 C. B. 134; *Brewin v. Short*, 5 E. & B. 227. See, too, *Ex parte Dobson*, 2 M. D. & D. 685, and *Burn v. Carvalho*, 4 M. & Cr. 690.

(*a*) *Ex parte Smith*, Buck, 149, and 3 Madd. 63; and see *Ex parte*

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ruptcy by a trader, are in his order and disposition, in fraud of, or against, or without the will of the true owner, are not within either the words or the spirit of the reputed-ownership clause (*d*). After a *bonâ fide* demand by the owner to have the goods restored to him, they cannot be said to remain with his consent in the possession of the bankrupt; and although, therefore, they do continue in his possession until he becomes bankrupt, his assignees must restore them (*e*). Again, if A. buys shares with B.'s money without his knowledge, and these shares are, also without B.'s knowledge, transferred into A.'s name and remain there until A. becomes bankrupt, his assignees will have no right to them (*f*).

Who are considered true owners.

The expression true owner includes creditors having an equitable or legal charge or lien upon goods and chattels left by their consent in the order and disposition of the bankrupt (*g*). Consequently, the liens of such persons on such goods are lost in the event of the bankruptcy of their debtor (*h*); and even where a trader deposits as a security for a debt, documents evidencing his title to choses in action (*e. g.*, bonds, policies, or share certificates), then, although the assignees cannot at law recover the documents deposited (*i*), the better opinion is that they are entitled to the money payable in respect of what those documents represent, unless notice of the deposit has been given to the proper persons (*k*).

Cases to which the doctrines of reputed ownership do not apply.

Having now alluded to the circumstances required to bring a case within the reputed-ownership clause, it is proposed to advert shortly to the non-application of that clause to property which, although apparently within its words, is not within its spirit.

(*d*) *West v. Skip*, 1 Ves. S. 239; *Ex parte Richardson*, Buck, 480. See, also, *Acraman v. Bates*, 2 E. & E. 456, as to goods at sea.

(*e*) *Smith v. Topping*, 5 B. & Ad. 674; *Brewin v. Short*, 5 E. & B. 227.

(*f*) See *Ex parte Hinds*, 3 De G. & S. 613.

(*g*) *Ryall v. Rowles*, 1 Ves. S. 348; *Hornsby v. Miller*, 1 E. & E. 192.

(*h*) See last note, and *Hoggard v. Mackenzie*, 25 Beav. 493; and see, as to mortgages by deed where the mortgagor retains possession, *Freshney v. Carrick*, 1 H. & N. 653; *Spackman v. Miller*, 12 C. B. N. S. 659.

(*i*) *Gibson v. Overbury*, 7 M. & W. 555; *Broadbent v. Varley*, 12 C. B. N. S. 214.

(*k*) *Ante*, p. 1134.

The doctrine of reputed ownership is confined to those cases in which possession of the goods by the bankrupt is not justified by any *bonâ fide* purpose requiring him to have them under his control (*l*). If, therefore, goods are entrusted to factors or brokers, to be disposed of by them in the ordinary course of trade, and they become bankrupt, such goods do not pass to their assignees; for the possession of the goods was not calculated to deceive any one conversant with mercantile operations (*m*). So, again, if property is vested in one person in trust for another for some legitimate purpose, and, having regard to the nature of the trust, is properly in the possession of the trustee, that property will not, on his bankruptcy, pass to his assignees, although it is in point of fact in his possession, order or disposition (*n*). In *Joy v. Campbell* (*o*), a leading case on this subject, shares in a company were held by the bankrupt in trust for another who had died, and whose executor the bankrupt was; and although no notice of the trust appeared in the company's books, and the bankrupt, therefore, had it in his power to dispose of them as he liked, they were held not to be within the mischief of the act, and not to pass to his assignees.

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Property in possession of bankrupt for legitimate purposes.

Trust property.

Joy v. Campbell.

If, however, shares stand in the name of one person in trust for another, simply for the purpose of concealing the fact that the latter is a shareholder, and if the person in whose name they are standing is in every respect the apparent owner, is treated as such, and has it in his power to deal with the shares in the market as if he were owner, and then he becomes bankrupt, the mere existence of such a trust for such a purpose, will not prevent the shares from being sold for the benefit of the bankrupt's creditors. This was decided in *Ex parte Burbridge* (*p*). There the bankrupt was the apparent owner of

Shares standing in name of bankrupt as a trustee not always exempt.

Ex parte Burbridge.

(*l*) See *Priestley v. Pratt*, L. R. 2 Ex. 101; *Hamilton v. Bell*, 10 Ex. 545; *Joy v. Campbell*, 1 Sch. & Lef. 328; *Holderness v. Rankin*, 2 De G. F. & J. 258.

(*m*) *Ex parte Flynn*, 1 Atk. 185; *Collins v. Forbes*, 3 T. R. 316, and the cases in the last note.

(*n*) *Ex parte Geaves*, 8 De G.

Mac. & G. 291; *Bankhead's Trusts*, 2 K. & J. 560; *Ex parte Gillett*, 3 Madd. 28; *Ex parte Martin*, 19 Ves. 491; *Ex parte Smith*, 4 D. & Ch. 579.

(*o*) 1 Sch. & Lef. 328.

(*p*) 1 Deac. 131, reversing *Ex parte Watkins*, 4 Deac. & Ch. 87; and see *Ex parte the Lancaster Canal*

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two shares of an insurance company, the rules of which did not permit any person, except a director, to hold more than two shares in his own name. The bankrupt was, in fact, a trustee for another shareholder, who had two other shares of his own and standing in his own name. The trust was evidenced by a writing signed by the bankrupt, but was not noticed in the company's books. The bankrupt was in all respects treated by the company as the owner of the shares standing in his name; he had the certificates in his possession; he received dividends and attended meetings; and it was held that although the shares were trust property, the trust was one which the company and the Court were at liberty to ignore, and that the shares were in the bankrupt's order and disposition, and saleable accordingly for the benefit of his creditors.

Property assigned
to bankrupt in
trust for the cre-
ditors of the
assignor.

Where one debtor assigns all his property to another debtor upon trust to pay the creditors of the first, and the second debtor takes possession of the property assigned, and whilst in possession becomes bankrupt, and then the first debtor becomes bankrupt, the property assigned will belong to the estate of the assignor, and not to the estate of the trustee (q).

Case where the
bankrupt is the
assignor's cre-
ditor.

Again, where goods and chattels are in the hands of a bankrupt, in order that he may apply them in payment of debts owing to him by the owner of the goods, the assignees must so apply them.

Ex parte Brown.

In *Ex parte Brown* (r), it was agreed that A. should send shares to B. for sale, and should draw on him on account, and that B. should apply the proceeds of the sales to take up the bills drawn upon him by A. This agreement was acted upon, and B. became bankrupt, having shares in his possession, and having accepted bills on account of them. It was held that the shares were not in B.'s reputed ownership, and that the indorsees of the bills had a right to have the shares sold, and to have the produce of the sale applied in payment of the bills.

Co., Mon. & Bl. 94, and further, as to secret trusts, *per* Lawrence, J., in *Horn v. Baker*, 9 East, 215, and 2 Sm. L. C.

(q) *Ex parte Zwilchenbart*, 3 M. D. & D. 671.

(r) 3 M. & A. 471.

2. *Particularly as regards partners.*

The preceding general notice of the doctrine of reputed ownership will, it is hoped, suffice to render its application to partners readily intelligible. So far as partners are concerned, the doctrine in question derives its chief importance from the effect it produces on the distribution of their assets; for it results from the reputed ownership clause that, in the event of bankruptcy, whatever is in the reputed ownership of the firm is distributable as its joint estate, whilst whatever is in the reputed ownership of some individual partner only, is distributable as his separate estate. And this rule prevails over all others; for when a case of reputed ownership is once established, it is not of the least consequence to whom the property in question really belongs. As an instance of this, reference may be made to *Ex parte Hare* (s), in which furniture belonging to one partner only, but kept in the office of the firm, and used there as part of the partnership effects, was, on the bankruptcy of the firm, distributed as joint estate. The same principle, probably, led to the decision in *Ex parte Hunter* (t), in which there were three partners, but one of them had no interest whatever in anything except the profits; it was contended that under these circumstances there was no joint property of the three, but it was held that the property of the two must be distributed as if it were the property of the three.

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Application of doctrine of reputed ownership to partners.

Effect of doctrine on joint and separate estate.

Ex parte Hare.

Ex parte Hunter.

Again, if goods and chattels are in the reputed ownership of one or more partners, the liens of the other partners upon such goods and chattels will be overridden in favour of the creditors of those in whose order and disposition the goods and chattels were at the time of the bankruptcy (u). Thus, in the case of *Hoggard v. Mackenzie* (x), where a Scotch firm had an establishment in London, which was conducted in its name by a manager, who had a lien on the goods consigned to

Liens destroyed by doctrines of reputed ownership.

Hoggard v. Mackenzie.

(s) 1 Deac. 16; 2 Mont. & A. D. 252.

478, *per* Erskine, C. J. Sir J. Cross thought the furniture was in point of fact partnership property. Compare *Ex parte Murton*, 1 M. D. &

(t) 2 Rose, 382.

(u) See *Ryall v. Rowles*, 1 Atk. 184.

(x) 25 Beav. 493.

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him by his principals for advances made by him, it was held, on the bankruptcy of the firm, that goods in the possession of the manager were in the reputed ownership of the firm, and that his lien could not prevail against the assignees.

The application of the doctrine of reputed ownership to partners, seldom presents peculiar difficulties, except when there has been a change in the firm, or where there is a dormant partner; but its application in these cases requires special notice, and to their consideration, therefore, it is proposed to pass.

Reputed ownership where there has been a change in the firm.

First, where there has been a change in the firm.—It follows from the principles examined in the preceding pages, that a mere change in the firm, whether by the introduction of a new partner or the retirement of an old one, does not necessarily cause a change in the reputed ownership of the property of the old firm. This is particularly true of debts owing to the old firm, and of merchandise belonging to it, but in the hands of third persons; and there is abundant authority to show that debts and goods left in the reputed ownership of the old firm, although in fact belonging to the new one, must, in the event of bankruptcy, be treated as the joint estate of the old firm.

Property of old firm continuing in its reputed ownership.

Ex parte Burton.

In *Ex parte Burton* (y) a firm of three partners, A., B., and C., was dissolved. A. continued the partnership business, and the debts due to the firm were assigned to him by B. and C. The dissolution was advertised, and the advertisement stated that all debts due by or to the firm would be paid or received by A. No other notice of A.'s exclusive title to the debts was given. A. became bankrupt, and shortly afterwards A., B., and C. became bankrupt. It was held that the debts assigned to A. were in the reputed ownership of A., B., and C.; for although A., as a partner, was entitled to receive the debts without reference to the assignment, still, until notice of that assignment was given to the debtors, they were as much at liberty to pay their debts to B. or C. as to A.

(y) 1 Gl. & J. 207. See, too, *Leaf*, 1 Deac. 176, where one member of the old firm had died. *Ex parte Usborne*, ib. 358; *Ex parte Hawtrey*, 7 Jur. 71; *Ex parte*

So, in *Ex parte Sprague* (z), a firm of A. and B. dissolved partnership; the dissolution was advertised in the *Gazette*; and the debtors of the firm were, by a circular, requested to pay their debts to A. The debts due to the firm were, in fact, awarded to A. by an arbitrator appointed by him and B. to determine the terms of dissolution. On the subsequent bankruptcy of A., and of A. and B., it was held that the debts due to A. and B. were in the order and disposition of the firm; for its debtors had had no notice that A. had become solely entitled to those debts, the circulars amounting to no more than a request that the debtors would pay their debts to A. on behalf of the firm.

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Ex parte
Sprague.

So with goods. If one of two partners retires and assigns his share and interest in the partnership property to the other, and part of that property consists of goods in the docks or at a wharfinger's, and notice of the assignment is not given to the custodian of the goods, they will, on the bankruptcy of the two partners, be treated as forming part of the joint estate, and not as part of the separate estate of the partner to whom they were assigned (a).

Ex parte Harris.

On the other hand, if proper notice of a change of ownership is given, that which was the property of the old firm will become part of the estate of the new firm. Further, if A. is the owner of goods in the custody of a third person, and A. takes B. into partnership with him, and gives notice to such person to hold the goods for A. and B., instead of for A. as formerly, and then A. and B. become bankrupt, those goods will be treated as in the reputed ownership of A. and B., although B. may have been a merely nominal partner, having no share in the assets of the partnership (b); nor will a lien on the goods in favour of the person in whose possession they are, affect the result, as between the estates of A., and of A. and B. (c).

Reputed ownership of old firm determined by notice.

It has already been seen that the doctrine of reputed owner-

(z) 4 De G. Mac. & G. 866; compare *Ex parte Woodgate*, 2 M. & D. 394, as to the sufficiency of the notice in this case.

583.

(b) *Ex parte Arbouin*, De Gex, 359.

(c) *Ibid*.

(a) *Ex parte Harris*, 1 Madd.

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Property of old
firm not in the
reputed owner-
ship of continu-
ing partners:

ship only applies where a bankrupt's possession of goods is not justified by any *bonâ fide* purpose requiring him to have them in his custody (*d*). This principle is peculiarly applicable to partners; for the possession by one partner of the goods of the firm may be, and often is, perfectly justifiable; and if one partner only is in possession of partnership goods, and the circumstances are not such as to show that he is in exclusive possession for purposes unconnected with the partnership, those goods will not be treated as in his order and disposition (*e*). In conformity with this principle, if a firm is dissolved and all its property is vested in one partner upon trust to pay the debts of the firm, and he becomes bankrupt, the property of the firm is not distributable as his separate estate, but retains its character of joint estate (*f*). It is not even necessary that there should be any actual assignment to him upon an express trust; for if a firm is simply dissolved and one partner continues in possession of its property, he is held to be in such possession on behalf of the firm, and for the purpose of winding up its affairs, until the contrary is proved (*g*).

Ex parte Cooper.

Thus, in the case of *Ex parte Cooper* (*h*), A. and B. dissolved partnership; a notice of the dissolution was inserted in the *Gazette*, and such notice stated that A. would receive and pay all debts. A. continued to carry on the partnership business in the name of the old firm, and he had its property in his possession. On the subsequent bankruptcy of A. and B., four months after the dissolution, it was held that the property of the firm in A.'s possession was not to be considered as in his order and disposition.

nor in that of
surviving
partner.

Where partnership property comes into the hands of one partner by survivorship, and that partner becomes bankrupt, very strong circumstances are required to show that such

(*d*) *Ante*, p. 1137.

421.

(*e*) *Ex parte Flyn*, 1 Atk. 185;
Ex parte Taylor, Mont. 240, item
the 2nd.

(*g*) *Ex parte Williams*, 11 Ves.
3; *Ex parte Taylor*, Mont. 240;
Ex parte Copeland, 3 Mont. & A.
177. See, too, *Ex parte Vardon*, 2
M. D. & D. 694.

(*f*) *Copeman v. Gallant*, 3 P. W.
314; and see *Ex parte Martin*, 19
Ves. 491; *Ex parte Fell*, 10 ib.
348; *Ex parte Pemberton*, 1 Deac.

(*h*) 1 M. D. & D. 358.

property is distributable as his separate, and not as joint, estate (i). If he continues to carry on the business, contrary to the trust reposed in him, and against the consent of the persons interested in the estates of the deceased partners, it is clear that the reputed ownership clause will not apply (k).

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Where, however, a partnership is dissolved, and one of the partners continues to carry on the business on his own account, and not for the purpose of winding up the affairs of the concern, and where, from lapse of time or otherwise, there is evidence to show acquiescence in such a course of proceeding on the part of the retired partners, then the nature of the partnership property will be held to have been changed, either by virtue of a tacit agreement between the partners themselves, or by virtue of the doctrine of reputed ownership; and in either case, that which was the joint estate of all will be distributable as the separate estate of the continuing partner (l). Thus, in *Horn v. Baker* (m), A., B., and C. dissolved partnership, and it was agreed that C. and a third person, D., should continue the business on their own account, and that they should pay an annuity to A., and after his death to his widow. The partnership property was not assigned to C. and D., but was allowed to remain in their possession for the purposes of their business; and on their bankruptcy, such of the property as consisted of goods and chattels was held to be in their order and disposition, with the consent of their true owner.

Difference where continuing partner carries on business for himself only.

Horn v. Baker.

So, where the continuing partner is a surviving partner, the doctrines of reputed ownership may apply, although, as before observed, under ordinary circumstances they do not. In *Ex parte Taylor* (n), a debt due to a firm had, on the death of one of the partners, been compromised by the survivors, who, in lieu of payment, had accepted from the debtor two promissory notes, and a policy of insurance, which, on their bankruptcy,

Ex parte Taylor.

(i) See *Brett v. Beckwith*, 3 Jur. 239, and on appeal, 17 L. J. Ch. N. S. 31, noticed *ante*, p. 1046; *Ex parte Leaf*, Mon. & Ch. 662; *Ex parte Heath*, 4 Jur. 28. Compare *Ex parte Taylor*, Mont. 240, noticed *infra*.

282.

(l) See *West v. Skip*, 1 Ves. S. 242; *Ex parte Barrow*, 2 Rose, 252; *Ex parte Fell*, 10 Ves. 347.

(m) 9 East, 215.

(k) *Stocken v. Dawson*, 9 Beav.

(n) Mont. 240, item No. 1.

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Effect of doctrine
of reputed owner-
ship on dormant
partners.
Caldwell v.
Gregory.

were in their possession. The Vice-Chancellor (Shadwell) held, that the debt, having been compromised by the surviving partner, was within the statute.

Secondly, where there is a dormant partner.—A dormant partner is seriously affected by the doctrine of reputed ownership. It was indeed held in *Caldwell v. Gregory* (o), that if there is a partnership of two persons, one of whom is dormant, and the other of whom becomes bankrupt, the share of the former does not pass to the assignees of the latter; it being monstrous to deprive the dormant partner of his share in the partnership property, and yet leave him liable to all the partnership creditors. However, this case must be considered as overruled, and it must be taken as settled by subsequent decisions that, under the circumstances supposed, the whole partnership property is in the order and disposition of the bankrupt, within the meaning of the reputed ownership clause, and is, therefore, distributable as if it belonged to him alone (p). The dormant partner is, in fact, ignored altogether. It naturally follows from this, that if a dormant partner retires, and the other partners continue to carry on the business of the firm, and become bankrupt, the partnership property is not the less in their order and disposition, from the circumstance that it was agreed that they should apply it in payment of the debts of the old firm (q).

Ex parte Wood.

In *Ex parte Wood* (r), A. and B. were partners, carrying on business in the name of A. They dissolved partnership, and it was agreed that A. should receive and pay all debts, and should retain the stock in trade, and pay B. for his interest. A. continued to carry on business on his own account, and became bankrupt, and afterwards B. became bankrupt. It was held that all the partnership debts and stock in trade were in A.'s order and disposition, as reputed owner at the time of his bankruptcy, and were consequently distributable as his separate

(o) 1 Price, 119, 130, and 2 Rose, 149.

and 8 Bing. 469; *Re Curry*, 12 Ir. Eq. 382.

(p) *Reynolds v. Bowley*, L. R. 2 Q. B. 41; *Ex parte Dyster*, 2 Rose, 256; *Ex parte Enderby*, 2 B. & C. 389; *Ex parte Chuck*, Mont. 365,

(q) *Ex parte Enderby*, 2 B. & C. 389; *Ex parte Chuck*, 8 Bing. 469; *Ex parte Jennings*, Mont. 45.

(r) *De Gex*, 134.

estate, although the dissolution of partnership had not been publicly made known.

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Where, however, a dormant partner is dead, that which the ostensible partner is entitled to receive or have in his possession as survivor, cannot be said to be in his order and disposition with the consent of the true owner (s), unless perhaps the executors of the deceased allow him to continue to carry on business with their testator's assets.

Dormant partner
dead.

SECTION IV.—THE ADMINISTRATION OF BANKRUPT PARTNERS' ESTATE.

1. *General principles.*

The principles according to which the property of bankrupt partners is distributed amongst the various persons having claims upon it, have next to be considered. These principles are the same, whether the estate to be administered is that of a single bankrupt partner, or that of a bankrupt firm. Consequently, the present subject may be conveniently disposed of by examining the principles which apply to a joint adjudication against the firm, and by noticing, as may be required, such peculiarities as are met with when the bankruptcy is confined to one partner only.

Administration
of estates of
bankrupt part-
ners.

In administering the estate of a bankrupt firm or of some or one only of its members, it is necessary to distinguish accurately, first, joint from separate estate; and, secondly, joint from separate debts: for the leading principle of administration is, if possible, to pay the debts of the firm (joint debts) out of the assets of the firm (joint estate), and the private debts of each partner (separate debts) out of his own private property (separate estate): in other words, to make each estate pay its own creditors (t).

Joint estate to
be distinguished
from separate
estate, and joint
debts from sepa-
rate debts.

This rule, which has long been established, was clearly laid

(s) See *Brett v. Beckwith*, 3 Jur. N. S. 31, and other cases cited *ante*, p. 1143, note (i).

and see 1 Mont. Part. 110, note 2, D.; Rules and Orders in Bankruptcy, No. 54.

(t) *Ex parte Elton*, 3 Ves. 239,

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Ex parte Cook.

down by Lord King in *Ex parte Cook* (u), in the following words: "It is settled, and is a resolution of convenience, that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors (x).

Fifty-fourth rule
in bankruptcy.

The rule thus laid down by Lord King still prevails. As regards joint adjudications, the 54th of the rules and orders in bankruptcy declares: "That any separate creditor of any bankrupt shall be at liberty to prove his debt under any adjudication of bankruptcy made against such bankrupt, jointly with any other person or persons. And under every such adjudication distinct accounts shall be kept of the joint estate, and also of the separate estate or estates of each bankrupt; and the separate estate shall be applied, in the first place, in satisfaction of the debts of the separate creditors. And in case there shall be an overplus of the separate estate, such overplus shall be carried to the account of the joint estate. And in case there shall be an overplus of the joint estate, such overplus shall be carried to the account of the separate estates of each bankrupt, in proportion to the right and interest of each bankrupt in the joint estate; and that the cost of taking such accounts be paid out of the joint and separate estates respectively as the Court shall direct."

12 & 13 Vict. c.
106, s. 140.

As regards separate adjudications, the Bankrupt law con-

(u) 2 P. W. 500. See, too, *Twiss v. Massey*, 1 Atk. 67; *Ex parte Crowder*, 2 Vern. 706.

(x) The principle enunciated above was departed from by Lord Thurlow, who allowed joint and separate creditors to be paid *pari passu*. Lord Rosslyn restored the old rule, but allowed the joint creditors to be paid *pari passu* with the separate creditors out of the separate estate in case of there

being no joint estate. The rule thus modified by Lord Rosslyn was adhered to by Lord Eldon, and has not since been departed from. See *Ex parte Taitt*, 16 Ves. 193; 1 Mont. Part. 110, note 2, D., and 67, note Q.; Cooke's Bank. Law, 259 *et seq.*, ed. 8. See for some reasons justifying the rule, *Lodge v. Pritchard*, 1 De G. J. & S. 613, 614, *per* Turner, L. J.

solidation act declares: "That if one or more of the partners of a firm be adjudged bankrupt, any creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall be entitled to prove his debt for the purpose only of voting in the choice of assignees, and of being heard against the allowance of the bankrupt's certificates, or of either of such purposes, but such creditor shall not receive any dividend out of the separate estate of the bankrupt, until all the separate creditors shall have received the full amount of their respective debts (y)."

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In order to carry out these principles, distinct accounts are kept of the joint and of the separate estates (z); and where, under a separate adjudication, the assignees possess themselves of the assets of the firm, they must keep similar distinct accounts, so as not to pay the separate creditors of the bankrupt out of the assets of the firm, or the creditors of the firm out of the separate property of the bankrupt (a).

Keeping distinct
accounts.

If a creditor proves his demand against the wrong estate he will, on discovering his mistake, be allowed to transfer his proof to the other estate (b).

Correcting mis-
takes, &c.

Where one estate has paid debts or expenses which ought to have been borne by the other, the amount so paid will be ordered to be refunded by the latter to the former estate (c).

(y) 12 & 13 Vict. c. 106, § 140.

(z) See rule 54, *supra*. A petition that separate accounts may be kept is improper where the general order applies: *Ex parte Green*, 1 D. & C. 382.

(a) See *Ex parte Voguel*, 1 Atk. 132, as to the old practice. See, too, *Cooke's Bank. Law*, 267, ed. 8, and the cases of *Ex parte Tate*, *Ex parte Hayward*, *Ex parte Burnaby*, there cited. See, too, *Watson on Part.* 324, and 1 Mont. Part. note 2, D., p. 110, in notes; *Dutton v. Morrison*, 17 Ves. 209; *Re Wait*, 1 J. & W. 610. Again, when persons are connected in various partnerships, and a joint adjudication is obtained against them all, an

order may be obtained for keeping separate accounts of the different firms, as well as the separate estates of each partner: *Ex parte Marlin*, 2 Bro. C. C. 15. But if there are several connected firms, one of which alone is made bankrupt, there can only be the common order for keeping separate accounts of the joint and separate estates of the partners composing it: *Ex parte Parker*, *Cooke's Bank. Law*, 272, ed. 8.

(b) *Ex parte Vining*, 1 Deac. 555.

(c) *Ex parte Rutherford*, 1 Rose, 201; *Ex parte Reid*, 2 ib. 84; and see *Rogers v. Mackenzie*, 4 Ves. 752, as to contribution between estates.

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Consolidation of
estates.

If the joint and separate creditors both agree that the joint and separate estates shall be consolidated and administered as one fund, there is no reason why such consolidation should not take place. And where the two estates are so blended that they cannot be kept separate, they must be consolidated, whether all the creditors desire it or not; but if it is practicable to keep them separate, they will not be consolidated except by consent (*d*). If a majority of a meeting of both classes of creditors are in favour of a consolidation, it will, nevertheless, not be made until after it has been ascertained by the Court to be for the general benefit (*e*). It is, however, to be observed that a consolidation of estates does not affect debts proved before the consolidation took place; and if a debt has been properly proved against each of several estates, the creditor will not be prejudiced by their subsequent consolidation (*f*).

Comparison of
the modes in
which lawyers
and accountants
proceed in cases
of bankruptcy.

The principle adopted in bankruptcy of making each estate pay its own creditors, often produces results strangely at variance with the doctrine of equality, and with an accountant's notions of right and wrong. This cannot be better shown than by the following extract from a work already referred to on the subject of partnership accounts: "We will suppose A., a man worth 40,000*l.* clear, well known in London, and of extensive credit, to embark with an inventor, B., to carry into effect some invention which requires apparently more credit than actual capital; there being what may fairly be considered a most excellent prospect of success, and of turning the concern, as the phrase is, within a short space of time, *i.e.*, receiving from the anticipated profits of the concern, within the number of months in which the bills given by this partnership becomes due, sufficient money to meet them or take them up. Some accident intervenes, by which it becomes necessary for A., who undertakes to find money, to raise a sum to meet

(*d*) *Ex parte Sheppard*, Mon. & Bl. 415.

(*e*) See *Ex parte Strutt*, 1 Gl. & J. 29; *Ex parte Part*, 2 Deac. & C. 1, where an inquiry was directed. In *Ex parte Smith*, 2 M. & A. 60,

it was held necessary to serve the assignees before making a consolidating order.

(*f*) *Ex parte Fuller*, 1 M. & A. 222.

the numerous bills which the firm has ventured to put afloat, in expectation of their being taken up by the success of the project. A. raises upon his credit from several persons, perhaps at a distance in the country and altogether ignorant of his trading, what he himself considers only temporary loans, to the amount of 39,000*l.*, and brings this money into the firm, not as a loan but as capital. We will further suppose that this is insufficient, and that the firm, after a few more struggles, stops payment for 50,000*l.*, owing to different individuals. A general meeting of all the creditors is called, at which there is a desire to settle the matter, and realise the effects as fast as possible, and for that purpose they put the matter into the hands of an accountant. If the accountant knew anything of the law of bankruptcy, he would see the difficulties; but if he simply followed out the mercantile principles, he would first take the accounts of the firm, and there find 50,000*l.* debt, and we will say 4000*l.* assets; and consequently a balance due to the firm from A. and B. to the amount of 46,000*l.*; of which A. would be indebted 23,000*l.* and B. 23,000*l.*, or in some other proportions as the case may be; but as B. is worth nothing at all, A. would be answerable for the whole. The accountant would then take A.'s accounts, where he finds A.'s estate worth 40,000*l.*, and that he is liable to the firm for 46,000*l.*, and to other people for 39,000*l.*, making the whole amount of his liabilities 85,000*l.*, upon which he would declare a dividend of 9*s.* 4½*d.* He would, therefore, carry over to the firm, as a creditor for 46,000*l.*, the sum of 21,647*l.* 1*s.* 3*d.*, and to the private creditors 18,352*l.* 18*s.* 9*d.*, which, distributed among the 39,000*l.*, would give them a dividend of 9*s.* 4½*d.* He would then proceed to distribute the effects of the firm, amounting to 21,647*l.* 1*s.* 3*d.*, recovered from A., and the assets in hand, viz., 4000*l.*, and this, being altogether 25,647*l.* 1*s.* 3*d.*, distributed among 50,000*l.*, would give a dividend of 10*s.* 3*d.* Such would be the result of the accountant's operation. But some of the separate creditors would probably be dissatisfied with this result, and strike a docket, and have the accounts taken in bankruptcy. The Court of Bankruptcy would immediately overthrow the accountant's labours, and take the accounts upon an entirely different

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plan. It would direct that the separate estate should be distributed amongst the separate creditors, and if there were any surplus, that it should be paid over to the joint estate. Therefore, as 40,000*l.* would be distributed among 39,000*l.*, they would be all paid in full, and 1000*l.* passed over to the joint estate, making the assets of the joint estate 5000*l.*, which, being distributed among the 50,000*l.*, would be exactly 2*s.* in the pound. Thus the Court of Bankruptcy would give the separate creditor 20*s.* in the pound, and the joint creditor 2*s.*; while, according to the mercantile principle, the separate creditors ought to have had but 9*s.* 4½*d.*, and the joint creditors 10*s.* 3*d.* Such is the difference between the practice of the two classes. But if the firm had had no property at all, or the partners, in a fit of despair, had pledged all the assets for more than they were worth, the Court of Bankruptcy would have adopted the accountant's principle, and suffered the joint creditors to go in for their dividend upon the separate estate" (*g*).

2. *Of joint estate and of separate estates.*

Joint and separate estates.

What property is distributable as partnership property, and what is not, depends mainly upon two questions, viz.:—

1. Whether, as between the partners themselves, the property in question belonged to them jointly, or to some or one of them to the exclusion of the others; and

2. Whether the property in question, no matter to whom it belonged, was, at the time of the bankruptcy, in the reputed ownership of the firm, or in that of some or one only of its members.

The principles applicable to these questions having been already fully examined, it is only necessary, in the present place, to notice those peculiar difficulties which are met with when it becomes necessary to distinguish joint from separate estate for the purposes of administration in bankruptcy.

Ex parte Ruffin.

It was decided in the celebrated case of *Ex parte Ruffin* (*h*), that agreements between partners altering the character of

(*g*) Cory on Merc. Accounts, p. 124, *et seq.*, ed. 2. (*h*) 6 Ves. 119.

partnership property are binding on the assignees, if made *bonâ fide*, and before the commission of any act of bankruptcy. This case has been followed by many others, and it is therefore now beyond dispute that if a partnership is dissolved, and a *bonâ fide* agreement is come to between the partners, to the effect that what was the partnership property shall become the property of him who continues the business, and afterwards the firm or the continuing partner becomes bankrupt, that which was the partnership property cannot be distributed as the joint estate of the firm, but must be treated as the separate estate of the continuing partner (*i*). The creditors of the firm have no lien on its property which can prevent the partners from *bonâ fide* changing its character, and converting it into the separate estate of one of them (*k*).

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Even if the liabilities of the partnership exceed its assets at the time when the agreement is made, still, if the partners act *bonâ fide*, and not with a view to defraud their creditors, the ownership in that which before the agreement was partnership property will have changed, and the joint creditors of the firm cannot insist on its distribution as joint estate (*l*).

In order, however, that property of the firm may have lost its character of joint estate by agreement between its partners, the agreement must not be tainted with fraud, nor be still executory. If there be fraud, whether as between the partners themselves or solely as against creditors, the agreement will not be binding on the assignees (*m*); and where both partners were insolvent, an assignment by one of them of his share to the other in consideration of a covenant by him to pay the partnership debts was held fraudulent and void as against the joint creditors (*n*). Moreover, if the agreement to transfer or

Observations on agreements converting joint into separate estate, and *vice versâ*.

(*i*) See *Re Walker*, 10 W. R. 656, L. J.; *Ex parte Titner*, 1 Atk. 136; *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Fell*, 10 ib. 347; *Ex parte Williams*, 11 ib. 6; *Ex parte Clarkson*, 4 D. & Ch. 56; *Ex parte Gurney*, 2 M. D. & D. 541; *Bolton v. Puller*, 1 Bos. & P. 539.

(*k*) *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 ib. 6; *Stuart v. Ferguson*, Hayes (Ir. Ex.) 472.

Compare *Ex parte Mayou*, noticed *infra*, note (*n*).

(*l*) *Ex parte Peake*, 1 Madd. 346; *Ex parte Clarkson*, 4 D. & C. 66, per Sir G. Rose, and see *Ex parte Carpenter*, Mont. & MacAr. 1.

(*m*) See *Ex parte Rowlandson*, 2 V. & B. 172, and 1 Rose, 416, and *Anderson v. Maltby*, 2 Ves. J. 244.

(*n*) *Ex parte Mayou*, 11 Jur. N. S. 433, L. C.

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Ex parte
Wheeler.

Ex parte
Clarkson.

Evidence of such
agreements.

assign is still executory, the character of the property will not, in fact, have been changed at the time of the bankruptcy, and it must, therefore, be distributed as if the agreement had not been entered into (o). Whether an agreement is executory or not, must depend upon its own particular nature; the test, however, is to see whether there was, at the time of the bankruptcy, any act still to be done before the ownership could be considered by the partners as changed; if in any case there was such an act to be done, the assignees will not be bound by the agreement, whilst if there was not they will. In *Ex parte Wheeler* (p), a partner retired; the continuing partner was to take the partnership property, and to pay the retiring partner an annuity, and the father of the continuing partner was to become surety for payment of this annuity. The father, however, who was not a party to the agreement, declined to become surety, and on the bankruptcy of the continuing partner it was held that the agreement was not an executed agreement, and that the property of the firm had not therefore, by the agreement, become the property of the bankrupt. On the other hand, in *Ex parte Clarkson* (q), where a partner retired upon the terms of receiving a certain sum of money, partly in cash and partly in bills, and the cash was paid and the bills were given, it was held that the ownership in the partnership property had passed, although the bills were subsequently dishonoured (r).

The mere fact that a partnership has been dissolved, or that a partner has retired, will not be sufficient evidence of an agreement that the continuing partner should become sole owner of the partnership property. It may be that the property has been entrusted to him simply for the purpose of winding up the affairs of the concern, and unless there be some agreement by virtue of which it has become his, it will in case of bankruptcy be distributable as joint estate (s).

(o) *Ex parte Wheeler*, Buck, 25; *Ex parte Cooper*, 1 M. D. & D. 358; and see *Ex parte Clarkson*, 4 D. & Ch. 64, 67.

(p) Buck, 25.

(q) 4 D. & Ch. 56; S. C., nomine *Ex parte Gibson*, 2 M. & Ayr. 4.

(r) Compare also *Ex parte Cooper*, 1 M. D. & D. 358, and *Ex parte Gurney*, 2 ib. 541.

(s) *Ex parte Leaf*, 4 Deac. 287; *Ex parte Cooper*, 1 M. D. & D. 358; *Ex parte Williams*, 11 Ves. 23. The agreement need not be

But, as before observed, whether property is as between the partners themselves the joint property of them all, or the separate property of some of them only, the nature of that property may for the purposes of distribution be altogether changed by reason of the doctrine of reputed ownership; and under ordinary circumstances if one partner owns all the property used for partnership purposes, and his co-partners have nothing more than an interest in the partnership business, still that property, if personal, will on the bankruptcy of the firm be distributable as the joint estate of all, and not as the separate estate of its true owner (*t*).

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Effect of doctrine of reputed ownership.

But, irrespectively of the doctrines of reputed ownership, if A. allows B. to carry on business with his, A.'s, goods, and on his, A.'s, behalf, although not in his name, but credit is given to them both on the supposition that they are partners, the property with which the business is carried on will be treated as the joint estate of the two and not as the separate estate of A. (*u*).

Effect of holding out.

Where property is distributable as joint estate, the joint creditors take it as the promiscuous joint property of all the partners, without reference to the respective interests of the partners therein (*x*).

3. *Of joint, separate, and joint and separate debts.*

For the purpose of administering the estates of bankrupt partners, their creditors must be divided into three classes, viz.:—

Of joint, separate, and joint and separate debts.

1. The joint creditors of the firm (*y*), to whom all the partners are jointly liable (*z*).

in writing, *ibid.*, and see 4 D. & Ch. 67, *per* Sir G. Rose.

(*t*) *Ex parte Hunter*, 2 Rose, 382; *Ex parte Owen*, 4 De G. & S. 351; compare *Ex parte Murton*, 1 M. D. & D. 252.

(*u*) See *Re Rowland and Crankshaw*, L. R. 1 Ch. App. 421.

(*x*) *Ex parte Hunter*, 2 Rose, 382.

(*y*) A curious misnomer. Joint

creditors, properly speaking, are persons jointly entitled, and not, as here, persons who have nothing to do with each other, but happen to have the same joint debtors.

(*z*) The word separate is relative. Creditors may be separate relatively to one person, and joint relatively to another, *e. g.*, suppose a partnership of five: creditors of any four

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2. The separate creditors of each partner, to whom the partners are only liable severally and *respectively*.

3. Joint *and* separate creditors, to whom the partners are not only liable jointly, but also separately for the same debt (*a*).

What is a debt of the firm and what is not, must be determined by the principles discussed in the first two chapters of the second book. Without repeating those principles it may be useful to recapitulate shortly the leading rules deducible from them, and bearing upon the proof of debts in bankruptcy.

What debts are originally joint and what separate.

First, as to the original nature of a debt.—As a general rule, that which is the debt of the firm is not the separate debt of any of its members who have not made themselves severally liable for it (*b*); but

Frauds and breaches of trust.

Breaches of trust, and frauds imputable to a firm, place the *cestuis que trustent* and defrauded creditors in the position of joint and several creditors (*c*); and

Debts.

A debt of a firm of two partners, of whom one is dormant, may, at the option of the creditor, be treated as the joint debt of the firm, or as the separate debt of the ostensible partner (*d*);

are separate relatively to the creditors of the five, but are joint relatively to the respective creditors of each of the four.

(*a*) A creditor who has obtained a judgment against several persons jointly, can levy execution against any one or more of them; and therefore, in one sense judgment debtors may be said to be jointly and severally liable. This, however, does not render their creditor a joint and separate creditor. He is a joint creditor; for his judgment is joint, and the remedies open to him do not alter the character of the right to enforce which they are given. See *Ex parte Christie*, Mont. & Bli. 352.

(*b*) See *Ex parte Dobinson*, 2 Deac. 341; *Ex parte Carlisle Canal Co.*, ib. 349; *Ex parte Appleby*, ib. 482; *Ex parte Benson*, 1 M. D. &

D. 750, and as to bills and notes, *Ex parte Flintoff*, 3 M. D. & D. 726; *Ex parte Wilson*, ib. 57; *Re Clarke*, De Gex, 153; *Ex parte Buckley*, 14 M. & W. 469, and 1 Ph. 562, reversing *Ex parte Christie*, 3 M. D. & D. 736.

(*c*) *Ex parte Poulson*, De Gex, 79; *Ex parte Barnewall*, 6 De G. Mac. & G. 801. Compare *Ex parte Greaves*, 8 De G. Mac. & G. 291, where, although there was a clear breach of trust by one partner, the others were not implicated in it. See, as to the trustee, *Ex parte Burton*, 3 M. D. & D. 364. As to frauds, see *Ex parte Unity, &c. Banking Association*, 3 De G. & J. 63.

(*d*) *Ex parte Hodgkinson*, 19 Ves. 294; *Ex parte Norfolk*, ib. 458; *Ex parte Law*, 3 Deac. 541.

and a debt of a firm of two partners, one of whom is merely nominal, may likewise, at the option of the creditor, be treated as the joint debt of the two, or as the separate debt of him who is in substance the whole firm (*e*). Bk. IV. Chap. 2.
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Bills accepted in the name of a trading firm give a right of proof against the joint estate to a *bonâ fide* holder for value without notice of the fact that they have been accepted or endorsed without authority (*f*); but not to a drawer affected with such notice (*g*); and if a separate creditor of one partner takes in payment a bill of the firm, he must, in order to entitle himself to prove against its joint estate, show that the bill was given with the sanction of the other partners (*h*). Bills.

Bills accepted in the name of one partner only do not give their holder a right to prove against the joint estate of the firm (*i*).

A separate creditor does not acquire a right to prove against the joint estate, simply because that estate has had the benefit of the money he seeks to recover; nor does the joint creditor acquire a right to prove against the separate estate of one partner because he alone has had such benefit (*k*). Money of which
firm has had the
benefit.

Secondly, as to the conversion of a joint into a separate debt, and vice versâ.—A joint creditor, who releases one of his debtors, cannot prove against the estates of any of the others (*l*); and the doctrine of merger, by taking a higher security; or Conversion of
joint into sepa-
rate debts, and
vice versâ.

(*e*) See *Ex parte Arbouin*, De Gex, 359. *Ex parte Law*, 3 Deac. 541.

(*f*) *Ex parte Bushell*, 3 M. D. & D. 615. (*k*) *Ex parte Wheatley*, Cooke's Bank. Law, 534, ed. 8; *Ex parte Peele*, 6 Ves. 602; *Ex parte Hartop*, 12 ib. 349; *Ex parte Hunter*, 1 Atk. 223; *Ex parte Emly*, 1 Rose, 65; *Re Ferrar*, 9 Ir. Ch. 11.

(*g*) *Ex parte Holdsworth*, 1 M. D. & D. 475. As to indorsees with notice availing themselves of the ignorance of their indorser, see *Rooth v. Quin*, 7 Price, 193.

(*h*) *Ex parte Thorpe*, 3 M. & A. 716; *Ex parte Austen*, 1 M. D. & D. 247; *Ex parte Agace*, 2 Cox, 312; *Ex parte Bonbonus*, 8 Ves. 540; *Ex parte Goulding*, 2 Gl. & J. 118.

(*i*) *Ex parte Bolitho*, Buck, 100; but where the name of the firm and of the acceptor are the same, see

(*l*) *Ex parte Slater*, 6 Ves. 146. So a creditor may, by dealing with his debtor, discharge that debtor's surety, and on the bankruptcy of the surety be precluded from proving against his estate. See *Ex parte Webster*, De Gex, 414, where the surety was a firm which had accepted bills sought to be proved against its joint estate.

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obtaining a judgment, applies in bankruptcy as well as at law, and has a most important influence on a creditor's right to prove against the joint estate of a firm or the separate estates of its members.

Merger.

A separate bond given to secure a joint debt creates a separate debt (*m*) and destroys the joint debt (*n*). A judgment has the same effect (*o*); and a joint judgment against several for a debt owing by them jointly and severally makes the debt joint only (*p*); but a separate judgment for a joint and separate debt, does not make it separate only (*q*).

Ex parte Waterfall.

Notwithstanding the effect of a judgment in merging the debt in respect of which it has been recovered, it was held in *Ex parte Waterfall* (*r*), that where a firm consisted of one partner in this country, and of other partners abroad, and a creditor of the firm sued the partner here and recovered judgment against him, the debt of the firm was not so extinguished as to preclude the creditor from proving against its joint estate on the subsequent bankruptcy of the judgment debtor.

Falling back on original debt after taking a security for it.

Where a creditor obtains an additional security for a pre-existing debt, and that security is not of such a nature as to merge the debt, he may, if the security becomes unavailable, fall back on the original debt. This is constantly done by the creditors of bankrupt partners; and the cases show that a creditor who takes a joint bill for a separate debt (*s*), or a separate bill for a joint debt (*t*), becomes, as he intended, a joint and several creditor, and does not lose his right of having recourse, in case of need, to his original debt, unless he has

(*m*) *Ex parte Flintoff*, 3 M. D. & D. 726.

(*n*) *Ex parte Hernaman*, 12 Jur. 643.

(*o*) *Ex parte Higgins*, 3 De G. & J. 33.

(*p*) *Ex parte Christie*, Mon. & Bl. 352.

(*q*) *Drake v. Mitchell*, 3 East, 251; *Re Clarkes*, 2 Jo. & Lat. 212; *Ex parte Bate*, 3 Deac. 358.

(*r*) 4 De G. & S. 199, and 15 Jur. 214, sub nom. *Ex parte Jones*. See too, *Ex parte Dunlop*, Buck, 253,

and *Ex parte Stanborough*, 5 Madd. 89, as to actions against several partners, some of whom are outlawed.

(*s*) *Ex parte Seddon*, 2 Cox, 49; *Ex parte Lobb*, 7 Ves. 592; *Ex parte Meinertzhagen*, 3 Deac. 101; *Ex parte Hay*, 15 Ves. 4; *Ex parte Kedie*, 2 D. & Ch. 321.

(*t*) *Ex parte Hodgkinson*, 19 Ves. 291. See, too, *Ex parte Raleigh*, 3 M. & A. 670; *Ex parte Fairlie*, Mont. 17.

taken the fresh security in substitution for his original demand. If, however, he has done this, he cannot fall back on his first debt.

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Thus in *Ex parte Whitmore* (u), upon the formation of a partnership between two persons, one of them wrote to his bankers, to whom he was indebted, and directed them to transfer any balance due from him to the debit of the new firm; this was done, and the bankers drew on the firm for the amount of the balance; the bills were accepted by the new firm, but were not paid. The firm afterwards became bankrupt, and it was held that the bankers, having exchanged debtors, could not be considered as the separate creditors of their old customer, and could only rank as joint creditors of the firm.

Ex parte Whitmore.

Unless, however, there has been a substitution of debtors, or unless a creditor has by reason of the doctrine of merger become deprived of his right to revert to his original debt, the acquisition of a fresh security will not destroy the rights which he may have independently of that security.

With respect to the right of a joint creditor to prove against a separate estate, or of a separate creditor to prove against a joint estate, on the ground that there has been a substitution of debtors, or that a new right has been acquired, it is to be remembered that there can be no such substitution or acquisition save by the creditor's consent. Consequently, if a partnership is dissolved, and by agreement between the partners one of them is to continue the business and pay all the debts, the creditors of the firm do not become the separate creditors of the continuing partner unless they accede to the arrangement so entered into between him and his co-partners (x). Upon precisely similar grounds, a creditor of one person does not become the joint creditor of him and another who enters into partnership with him, merely because the two partners have agreed between themselves that the debts of each shall be the debts of both. Unless the creditor accedes to that arrangement, he is not bound by it, nor can he avail himself of it;

Substitution of debtors can only be made with the creditor's consent.

(u) 3 Deac. 365. See, too, *Ex parte Kirby*, Buck, 511, and *Ex parte Jackson*, 2 M. D. & D. 146.

(x) *Ante*, p. 440, *et seq.*; *Ex parte*

Freeman, Buck, 471; *Ex parte Fry*, 1 Gl. & J. 96; *Ex parte Gurney*, 2 M. D. & D. 541; *Ex parte Appleby*, 2 Deac. 482.

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Easier for separate creditor to become a joint creditor than *vice versâ*.

his position in fact is unaltered, he does not lose his old right, nor does he gain any new one (*y*).

It is easier for a separate creditor to establish a right to prove against the joint estate, than for a joint creditor to establish a right to prove against a separate estate; for, whilst all that is necessary in the first case is to show that those who were not originally debtors, have become so (*z*), it is necessary in the last case to show that a person already a debtor with others, has taken his and their debt upon himself alone. The difficulty here adverted to does not arise from any legal doctrine, but from the circumstance that what such a debtor may do is *primâ facie* referable to him in his character of joint debtor, and does not therefore establish what is wanted, viz., his separate liability. For this reason it has been frequently held that a joint creditor of two or more persons does not become the separate creditor of one of them by entering into arrangements with him for the payment of the debt by him (*a*), and that in the case of a dissolution of partnership a creditor of the firm who merely treats the continuing partner as his debtor, does not acquire a right to prove against his separate estate (*b*). To

(*y*) *Ante*, pp. 394, *et seq.*; *Ex parte Jackson*, 1 Ves. J. 130; *Ex parte Peele*, 6 ib. 601; *Ex parte Williams*, Buck, 13; *Re Littles*, 10 Ir. Eq. 275; *Ex parte Parker*, 2 M. D. & D. 511; *Ex parte Graham*, ib. 781; *Ex parte Hitchcock*, 3 Deac. 507. As to what is a sufficient accession, see *Rolfe v. Flower*, L. R. 1 P. C. 27. Mr. Cooke, indeed, lays it down that if new partners come into a firm, and it is agreed that the stock and debts of the old firm shall become those of the new firm, and the latter becomes bankrupt, the creditors of the old firm may prove against the joint estate of the new firm; and he cites *Ex parte Bingham* and *Ex parte Clowes*, 2 Bro. C. C. 592 (Cooke's Bank. Law, 534, ed. 8). The facts of the first of these two cases are not stated. *Ex parte Clowes* was a very peculiar

case, and if it was ever an authority for the doctrine that a separate debt can, as between the partners and the creditor, become a joint debt, or *vice versâ*, without the privity of the creditor, the case must be considered as no longer law. See 1 Mont. Part. note 2 F. p. 117, in notes. Perhaps Mr. Cooke rested the right of proof on the absence of joint estate, as in *Ex parte Taylor*, 2 M. D. & D. 753.

(*z*) A written agreement is not necessary to establish this, *Ex parte Lane*, De Gex, 300.

(*a*) *Ex parte Raleigh*, 3 M. & A. 670; *Ex parte Fairlie*, Mont. 17; *Ex parte Smith*, 1 M. D. & D. 165.

(*b*) *Ex parte Appleby*, 2 Deac. 482; *Ex parte Gurney*, 2 M. D. & D. 541; *Ex parte Fry*, 1 Gl. & J. 96; *Ex parte Freeman*, Buck, 471.

entitle himself so to prove, the creditor must show either that the continuing partner has become separately liable for the debt for which he was and is already liable jointly with his former partners (c), or that there is no joint estate (d).

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4. *Of the proof and payment of partner's debts generally.*

There is nothing peculiar in the mode of proving debts by or against partners, nor is there any difference between the claims which are proveable by or against them and claims which are proveable by and against other persons. For information on these subjects the reader is therefore referred to treatises on the law of bankruptcy.

Companies which are incorporated, or are empowered to sue and be sued by public officers, can prove their debts by an agent (e).

If a bankrupt is a trustee, and is himself indebted to the estate legally vested in him, he ought himself to prove against himself on behalf of those whose trustee he is (f). It is important to bear this in mind in those cases in which an executor has carried on his testator's trade with assets which ought not to have been employed therein, and has subsequently become bankrupt.

Bankrupt trustee ought to prove against his own estate.

With respect to debts proveable against bankrupts, several rules require to be noticed, although they are not peculiar to the debts of bankrupt partners.

Debts proveable.

Although the debt on which an adjudication can be obtained must be a legal and not merely an equitable debt, any debt, legal or equitable, can be proved under an adjudication (g).

In cases where a creditor of a bankrupt is also his debtor,

(c) See the cases in the last two notes, and compare *Ex parte Bradbury*, Mon. & Ch. 625, where a joint creditor had acquired a right to prove against a separate estate.

(d) See *Ex parte Taylor*, 2 M. D. & D. 753. This matter will be alluded to hereafter.

(e) 24 & 25 Vict. c. 134, § 144;

and 12 & 13 Vict. c. 106, § 164.

(f) See *Ex parte Richardson*, Buck, 202, and 3 Madd. 138; *Ex parte Shaw*, 1 Gl. & Jam. 127.

(g) *Ex parte Yonge*, 3 V. & B. 40; *Ex parte Williamson*, 2 Ves. S. 252. As to debts released at law, see *Ex parte Harvey*, 4 De G. Mac. & G. 881.

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Debts prove-
able.

and the doctrines of mutual credit are applicable (*h*), the balance due to the creditor and that only can be proved (*i*).

A debt not actually due from the bankrupt might, under the old law, be proved against his estate, subject to rebate (*k*).

A surety of the bankrupt who had paid the principal creditor before or after the bankruptcy was, under the old law, entitled to prove for what he had so paid (*l*).

Debts payable on a contingency might be proved, under the old law, if capable of valuation (*m*); or they might be first claimed and then proved after they had become payable (*n*).

Under the Bankruptcy act, 1861,

Proportionate parts of rent and other periodical payments, up to the day of adjudication, are proveable as if they grew due from day to day (*o*).

Unpaid instalments of debts payable by instalments are proveable (*p*).

Where a person has a claim against a bankrupt for unliquidated damages, by reason of some contract or promise, such damages may be assessed by a jury, and the amount proved as if it had been a debt due at the time of the bankruptcy (*q*).

The value of the interest of a person to whom any premiums upon any policy are payable by a bankrupt may also be ascertained and proved (*r*).

Calls.

Calls on shares held by a bankrupt shareholder require special notice. Calls made before adjudication are clearly proveable like other debts; and it is immaterial whether such calls are made by directors whilst a company is carrying on business, or by liquidators when a company is being wound up (*s*). But with respect to calls made after adjudication, the authorities are not a little embarrassing. Calls made by direc-

(*h*) As to which see *ante*, pp. 1102, *et seq.*

(*i*) 12 & 13 Vict. c. 106, §. 171.

(*k*) 12 & 13 Vict. c. 106, §. 172, and see as to policies of insurance, § 174; as to annuities, § 175.

(*l*) 12 & 13 Vict. c. 106, § 173. See *Ex parte Meyer*, De Gex, 632; *Ex parte Brown*, 2 M. D. & D. 718; *Rice v. Gordon*, 11 Beav. 265.

(*m*) 12 & 13 Vict. c. 106, § 177. See *Ex parte Eyre*, 1 Ph. 227; *Hinton v. Acraman*, 2 C. B. 367.

(*n*) 12 & 13 Vict. c. 106, § 178.

(*o*) 24 & 25 Vict. c. 134, § 150.

(*p*) *Ib.* § 151.

(*q*) *Ib.* § 153.

(*r*) *Ib.* § 154.

(*s*) As in *Ex parte Brown*, 3 De G. & Sm. 590.

tors after adjudication are not proveable under the Bankruptcy act of 1849, it being wholly uncertain at the time of adjudication whether they will ever be made or not; they are consequently neither debts payable presently or at a future time, nor are they debts payable on a contingency within the meaning of that act (*t*). Neither does the Bankruptcy act of 1861 make such calls proveable (*u*). The same reasons are as applicable to calls made under the Winding-up acts as to other calls; and accordingly, in *The General Discount Company v. Stokes* (*x*), where a shareholder in a company had been adjudicated bankrupt and had obtained his certificate, and afterwards the company was ordered to be wound up and a call was made, the Court of Common Pleas held the certificate not to be a bar to the call, the call not having been proveable in the bankruptcy. Unfortunately, however, this decision is opposed to others which do not appear to have been brought to the attention of the Court. There are several cases in which calls made under the Winding-up acts of 1848 and 1849 after an adjudication of bankruptcy, have been held to be proveable against the bankrupt's estate; not only when the winding-up order preceded the adjudication (*y*), but even where, as in the *General Discount Company v. Stokes*, the adjudication preceded the winding-up order (*z*).

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Calls.

General Discount
Company v.
Stokes.

The difficulties arising from the conflict of these decisions are, however, apparently removed by the Companies act, 1862; for by § 75 of that act it is expressly declared that the liability of any person to calls where a company is being wound up is to be deemed a debt accruing due from him at the time his liability commenced, but payable when the calls are made; and the estimated value of his liability to future calls, as well as calls already made, are, in the event of his bankruptcy,

Companies act,
1862, § 75.

(*t*) *South Staffordshire Rail. Co. v. Burnside*, 5 Ex. 129; *Wylam's Steam Fuel Co. v. Street*, 10 ib. 849. See, also, *General Discount Co. v. Stokes*, 17 C. B. N. S. 765.

(*u*) See 24 & 25 Vict. c. 134, §§ 150, *et seq.*

(*x*) 17 C. B. N. S. 765. This company was being wound up

under the acts of 1836-37, which did not contain any such section as § 75 of the act of 1862.

(*y*) As in *Parbury's case*, 3 De G. F. & J. 80.

(*z*) *Ex parte Nicholas*, 2 De G. Mac. & G. 271. See, also, *Chapple's case*, 5 De G. & Sm. 400; *Greenshield's case*, ib. 599.

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proveable against his estate: and it has been settled by judicial decision that a person's liability commences, within the meaning of the above section, when he becomes a member (*a*). If this be so, all calls made under the winding up of a company are proveable against the estate of a bankrupt shareholder, although the calls and the winding-up order are subsequent to the adjudication. But if a bankrupt shareholder continues to hold his shares after he has obtained his order of discharge, he must, it is apprehended, be liable to calls made under a subsequent winding-up order.

With certain exceptions (*b*), the assets in the hands of the assignees are distributable *pari passu* amongst all the unsecured creditors for value of the bankrupt, without regard to the question whether they are creditors by specialty or by simple contract (*c*).

Debts secured.

A creditor whose debt is secured by a mortgage or pledge is not allowed to retain his security and also to prove in competition with the other creditors. Such a creditor cannot prove his debt or any part of it without giving the other creditors the benefit of his security (*d*). This, however, he can do in one of two ways, viz., either realise his security and prove for the balance then remaining due to him, or give up his security altogether and prove for his whole debt (*e*).

Secured creditor
not compellable
to give up his
security.

If the creditor's security is sufficient to pay what is due to him, there is no necessity for him to apply to the Court of Bankruptcy at all; but if it is insufficient, he commonly

(*a*) *Ex parte Canwell*, 10 Jur. N. S. 481. See, also, *Williams v. Harding*, L. R. 1 Ho. Lo. 9.

(*b*) The exceptions are enumerated in 12 & 13 Vict. c. 106, §§ 166-170, and 24 & 25 Vict. c. 134, § 156. See as to monies due to friendly societies, *Ex parte Appagh*, 1 M. D. & D. 83; *Ex parte Whipham*, 3 ib. 564; and as to monies due to savings banks, *Ex parte Riddell*, 3 M. D. & D. 80; *Absolom v. Gething*, 32 Beav. 322; and as to debts due to the Crown, *Rogers v. Mackenzie*, 4 Ves. 752.

(*c*) As to voluntary bonds, see *Ex parte Berry*, 19 Ves. 218; *Ex parte Hoskins*, 3 De G. & S. 549.

(*d*) If he proves for the whole debt he loses the benefit of his security: *Ex parte Solomons*, 1 Gl. & Jam. 25; *Grudgeon v. Gerrard*, 4 Y. & C. Ex. 119.

(*e*) See *Ex parte Prescott*, 4 D. & Ch. 23, in which the rule was applied to joint debts and joint securities. See 12 & 13 Vict. c. 106, § 184; and Rules and Orders in Bank. 55 to 58.

petitions the Court to have his security realised under its direction, to have the proceeds applied in discharge of his debt, and to have liberty to prove for the difference (*f*). The assignees, however, have no power to compel a secured creditor to take this course; nor can they deprive him of his security without paying in full what may be due to him upon it (*g*). Moreover, it must be borne in mind that an equitable mortgage may be created without any written memorandum, and, if originally made for a particular debt, may be extended by parol to some other debt (*h*); and that a creditor who has a security not exclusively appropriated to a particular debt may, on the bankruptcy of his debtor, appropriate that security to any debt which may be owing to him by the bankrupt (*i*). Moreover, a security may be more extensive as against one person than as against another, *e.g.*, more extensive as against a principal debtor than as against his surety (*k*).

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Observations on
equitable se-
curities.

The rule which precludes a secured creditor from retaining his security and also proving for his debt, applies only where the debt is payable out of the estate to which the security belongs; or in other words, only where the same estate is debtor to the amount due on the security, and creditor by the value of the same security. Consequently a creditor of a bankrupt firm of two partners, holding a security given by a larger firm of which the bankrupts are members, is not affected by the rule in question, but may prove for the whole amount of the debt against the estate of the bankrupt firm, and yet retain the security given by the larger and solvent firm (*l*). So, if one partner mortgages his own property for

Cases in which a
secured creditor
can prove and
also retain his
security.

(*f*) Bonds, bills of exchange, and other personal securities in the hands of a creditor are treated like real securities, *Ex parte Hellier*, Cooke's Bank. L. 146, ed. 8.

(*g*) *Ex parte Jackson*, 5 Ves. 357; *Ex parte Topham*, 1 Madd. 38.

(*h*) See *Ex parte Barnett*, De Gex, 194; *Ex parte Ford*, 3 M. D. & D. 457; *Ex parte Moss*, 13 Jur. 866.

(*i*) See *Ex parte Johnson*, 3 De G. Mac. & G. 218; *Ex parte Hunter*, 6 Ves. 94. Compare *Ex parte*

McKenna, 7 Jur. N. S. 588, which turned on the terms of the deposit. See further on this subject, the cases referred to, *ante*, p. 1104.

(*k*) *Ex parte Walker*, 3 Deac. 672.

(*l*) *Ex parte Parr*, 1 Rose, 76; *Ex parte Bloxham*, 6 Ves. 449; *Ex parte Goodman*, 3 Madd. 373; *Ex parte Sammon*, 1 D. & C. 564. See, too, *Ex parte Wilson*, 2 Jur. 67, where a creditor of two firms engaged in a joint transaction, proved

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the debt of the firm, the creditor is allowed on the bankruptcy of the firm to prove for his whole debt against the joint estate, and yet retain the mortgage security given by the one partner (*m*).

Cases in which
a secured creditor
can prove
and also retain
his security.

Again, if A. and B. are partners, and A. gives a separate security for a partnership debt and dies, and B. becomes bankrupt, the creditor can prove against B.'s estate without giving up his security (*n*). So, where a creditor of a firm has a security belonging to the firm and also a separate covenant for payment by each partner, such creditor may, on the bankruptcy of the firm, retain his security and prove against the separate estates of the covenanters (*o*). Again, where a firm has assigned its property in trust for its creditors, whose rights against the separate estates of the partners are expressly reserved, a creditor who is both a joint and a separate creditor may claim the benefit of the assignment, and yet prove as a separate creditor against one of the firm if he becomes bankrupt (*p*). Where, however, one partner only is bankrupt, and a joint creditor is secured by a mortgage of the bankrupt's separate estate, that creditor cannot prove as a separate creditor without giving up his security; and if the mortgage is a mere equitable mortgage, giving the creditor no *locus standi* as a separate creditor and nothing more than a lien, he will not be a separate creditor of the bankrupt, or be allowed to prove against his separate estate at all (*q*).

against one and retained his security against the other.

(*m*) *Ex parte Peacock*, 2 Gl. & J. 27; *Ex parte Adams*, 3 M. & Ayr. 157; *Ex parte Groom*, 2 Deac. 265. In *Ex parte Connell*, 3 Deac. 201, it was held, Sir J. Cross dissentient, that a company which had lent money to a firm on the security of shares held by each partner separately in that company, was not entitled to prove for the loan against the joint estate of the firm without deducting the value of the shares. In that case, however, the shares held by each partner were in fact partnership property, and,

therefore, the decision is not, as has been supposed, at variance with the cases just cited, but is in conformity with *Ex parte Prescott*, ante, note (*e*).

(*n*) *Ex parte Bowden*, 1 D. & C. 135; *Ex parte Smyth*, 3 Deac. 597.

(*o*) *Re Plummer*, 1 Ph. 56, settling the doubts raised in *Ex parte Shepherd*, 1 M. D. & D. 101, and *Ex parte Davenport*, ib. 313.

(*p*) *Ex parte Thornton*, 5 Jur. N. S. 212. See, too, *Ex parte Geaves*, 8 De G. Mac. & G. 291.

(*q*) *Ex parte Leicestershire Banking Co.*, De Gex, 292; *Ex parte Lloyd*, 3 M. & A. 601. The Courts

The rule which enables a joint creditor, having a separate security, to prove as a creditor, and yet retain his security, applies to persons who claim, not as creditors merely, but also as *cestuis que trustent*. Consequently, if A., B. and C. are bankers, having trust-monies in their hands, and A. afterwards improperly invests some of it on a mortgage, the *cestuis que trustent* may, on the bankruptcy of the firm, claim the benefit of the mortgage, and prove against the joint estate of the firm for the whole amount due from it in respect of the trust monies (*r*).

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Position of cestui
que trust.

A curious and instructive case on the right of a creditor to prove without giving up his security, arose in *Ex parte Turney* (*s*). There A. and B., father and son, were partners; A. equitably mortgaged an estate of his own to secure a debt due from B. A. afterwards died, and the estate descended to B., subject to the mortgage in question. At A.'s death, however, the joint debts of A. and B. were more than sufficient to exhaust A.'s assets. B. having become bankrupt shortly after his father's death, it was held that, notwithstanding the descent of the mortgaged estate to B., the mortgage creditor was at liberty to prove against B., without giving up the security, although it was admitted that this could not have been allowed if the descended estate had been of any value to B.

Ex parte Turney.

The same principle of equality amongst creditors which prevents one creditor from holding a security, and proving for what is due on it, is also the foundation of the rule that no creditor who has sued a bankrupt at law, or in equity, in respect of any demand which might have been proved as a debt under the bankruptcy, can prove thereunder for that debt, without relinquishing his suit: and if he proves, he thereby elects to abandon the suit (*t*). But this rule, like the

Rule that a creditor must elect between action and proof.

will, however, order the security to be sold to enable the creditor to vote in the choice of assignees, &c., *ibid*.

(*r*) See *Ex parte Biddulph*, 3 De G. & S. 587, and *Ex parte Burton*, 3 M. D. & D. 364.

(*s*) 3 M. D. & D. 576.

(*t*) See 12 & 13 Vict. c. 106, § 182. This rule applies to official

liquidators proving for calls: *Re Pepper*, 2 New Rep. 351. A creditor who sues a bankrupt and takes him in execution, cannot prove against his estate for the debt, which is satisfied by the arrest: *Ex parte Bisson*; *Ex parte Caton*; *Ex parte Hewitt*; all in Cooke's Bank. L. 157, ed. 8.

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last, is subject to an exception, where the creditor is, in respect of the same demand, the creditor not only of the bankrupt, but also of another person; for in this case [he may prove against the estate of the former, and yet sue the latter, and get from him what he can (*u*). Consequently, if a creditor of a firm, one of the members of which is alone bankrupt, is in a position to prove against his estate, such creditor may prove against it, and, at the same time, sue the solvent partners (*x*), and, if necessary, join the bankrupt as a co-defendant (*y*). Moreover, a creditor who has two distinct demands against a bankrupt, may sue in respect of one, and prove in respect of the other (*z*).

A. Proof against the joint estate.

Having adverted to the proof and payment of debts generally, it is proposed to pass to the subject of the proof and payment of the debts of partners.

Administration
of partner's joint
estate.

The administration of the joint estate will be best explained by examining:—

1. The rights of the joint creditors,
 2. The rights of the partners,
 3. The rights of their separate creditors,
- as against that estate.

First, with respect to the joint creditors.

1. Position of
the joint credi-
tors.

The joint creditors have the first claim for payment out of the joint estate (*a*): and until they have been paid all the

(*u*) 12 & 13 Vict. c. 106, § 182. See as to cases of suretyship, *Ex parte Coplestone*, Mon. & Ch. 262.

(*x*) *Bottomley v. Nuttall*, 5 C. B. N. S. 122; *Heath v. Hall*, 4 Taunt. 326; *Bovill v. Wood*, 2 M. & S. 22; *Harley v. Greenwood*, 5 B. & A. 95; *Ex parte Read*, 1 Rose, 460. Compare *Blannin v. Taylor*, Gow. N. P. 199.

(*y*) If the bankrupt has obtained his order of discharge, he need not be joined, 3 & 4 Wm. 4, c. 42, § 9.

If he is joined, he must be indemnified against costs: *Ex parte Stanton*, 1 M. D. & D. 273.

(*z*) *Ex parte Crinsoz*, 1 Bro. C. C. 270; *Ex parte Botterill*, 1 Atk. 109; *Watson v. Medex*, 1 B. & A. 121; *Harley v. Greenwood*, 5 ib. 95; *Bridget v. Mills*, 4 Bing. 18; *Ex parte Glover*, 1 Gl. & J. 270; *Ex parte Sly*, 2 Gl. & J. 163; *Ex parte Edwards*, Mon & MacAr. 116.

(*a*) Rules and Orders in Bankruptcy, No. 54, and *ante*, p. 1145.

principal monies due to them, with interest thereon (*b*) (if their debts carry interest), no other person is entitled to receive a farthing out of the assets of the firm (*c*). If a person is truly a creditor of the firm, he is not deprived of his right to rank as a joint creditor, merely because he may have some separate security for his debt (*d*); for he is treated, in such a case, as a joint creditor having the advantage of a collateral security (*e*). But it must not be forgotten, that a person who advances money to one partner, on his separate security, and making him alone the debtor, has no *locus standi* against the firm merely because the money is afterwards applied to its use (*f*).

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Secondly, with respect to the partners.

Subject to the exceptions which will be hereafter stated, it is an established rule that a partner in a bankrupt firm shall not prove in competition with the creditors of the firm. They are, in fact, his own creditors, and he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself (*g*). If, therefore, a partner is a creditor of the firm, neither he nor his separate creditors (for they are in no better position than himself) can compete with the joint creditors as against the joint estate. Lord Hardwicke, it is true, in *Ex parte Hunter* (*h*), allowed this to be done; but that case has not, in this respect, been followed, and has long been considered as overruled (*i*).

2. Position of
the partners.

(*b*) *Ex parte Ogle*, Mont. 350; *Pearce v. Slocombe*, 3 Y. & C. Ex. 84; *Ex parte Reeve*, 9 Ves. 590, and see *Ex parte Woodford*, 3 De G. & S. 666.

(*c*) The expenses of getting in joint estate, must of course be paid out of it: *Ex parte Rutherford*, 1 Rose, 201.

(*d*) See *Ex parte Brown*, cited 1 Atk. 225; *Ex parte Clowes*, 2 Bro. C. C. 595; *Ex parte Harman*, 2 Gl. & J. 27.

(*e*) See *Ex parte Hunter*, 1 Atk. 227; *Ex parte Harman*, 2 Gl. & J. 27, and *ante*, p. 1163.

(*f*) *Ex parte Hunter*, 1 Atk. 223; *Ex parte Emly*, 1 Rose, 65; *Lloyd v. Freshfield*, 9 D. & Ry. 19; and see *ante*, pp. 364 *et seq.*, and 1155.

(*g*) See *Ex parte Sillitoe*, 1 Gl. & J. 382; *Ex parte Hargreaves*, 1 Cox, 441; *Ex parte Reeve*, 9 Ves. 350; *Ex parte Rawson*, Jac. 279.

(*h*) *Cooke's Bank. Law*, 526, ed. 8, and 1 Atk. 223.

(*i*) *Ex parte Burrell*; *Ex parte Parker*; *Ex parte Pine*, all cited in *Cooke's Bank. Law*, 528, ed. 8, and see *per* *Ld. Eldon*, *Ex parte Harris*, 1 Rose, 438.

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Ex parte
Sillitoe.

In *Ex parte Sillitoe* (k), a leading case on this subject, two partners in a banking firm carried on a separate business as ironmongers, and became creditors of the bank to a large amount, in consequence of having, with a view to enable the bank the better to obtain money, discounted their securities. The banking firm was adjudged bankrupt, and an attempt was made on behalf of the ironmongery firm, to prove, as joint creditors, against the joint estate of the bank. Lord Eldon, overruling the decision of the Vice-Chancellor, rejected the proof upon the ground which is stated above.

Ex parte Har-
greaves.

So, in the previous case of *Ex parte Hargreaves* (l), alias *Shakeshaft, Stirrup and Salisbury*, three persons were partners as cotton manufacturers, and two of them were also partners as linen-draper: goods, manufactured by the three, were consigned to the two for sale, for the benefit of the larger firm, and bills were drawn on the two, on behalf of the three; both firms became bankrupt, and the larger firm was indebted to the smaller in respect of the above transactions. It was held, that the smaller firm being liable to the debts of the larger firm, the assignees of the former could not compete with the joint creditors of the latter.

Executors of de-
ceased partner.
Ex parte But-
terfield.

Again, in *Ex parte Butterfield* (m), a sole trader directed by his will that it should be lawful for his widow to employ 6000*l.* in continuing his business, and he appointed her and his son executors. After the testator's death, his widow and son continued his business with his assets, and became bankrupt. The persons beneficially interested in the assets which had been employed by the bankrupts, sought to prove, in respect thereof, against their joint estate; but it was held that, to the extent of 6000*l.*, no such proof could be allowed, for the employment of 6000*l.* being authorised by the will, the proof could not be admitted, without, in substance, infringing the

(k) 1 Gl. & J. 382. *Ex parte Williams*, 3 M. D. & D. 433, was a similar case.

(l) 1 Cox, 440, and 1 Gl. & J. 382, and 11 Ves. 414.

(m) De Gex, 570. See, too, *Ex parte Garland*, 10 Ves. 110, where proof in respect of assets improperly

employed was admitted, and proof in respect of assets properly employed was rejected. See, also, *Scott v. Izon*, 34 Beav. 434; *Ex parte Thompson*, 2 M. D. & D. 761, and compare the cases in the next note.

rule which precludes a partner from competing with his own creditors. Bk. IV. Chap. 2.
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This case may be usefully compared with *Ex parte Coster's Executors* (n). There, partnership articles provided in effect that if one of the partners died, so much of his share in the capital, as should not exceed 100,000*l.*, should be continued in and be considered as part of the partnership effects; that the survivors should pay off the amount of the deceased's share by instalments, with interest, but that his estate should not share in the profits accruing after his death. The partner in question having died, more than 150,000*l.* was found due to him from the partnership. His executors took a bond for this amount from the surviving partners, who afterwards became bankrupt. It was held, that the executors were entitled to prove against the joint estate for the whole amount of the bond, and not only for the excess over 100,000*l.*, as the other joint creditors contended. The provisions of the deed taken together showed plainly that the 100,000*l.* was intended to be continued in the concern in the sense of a loan bearing interest, and that although the money was to be employed in the business of the partnership, it was to be so employed, not as the money of the deceased, but as the money of the surviving partners, borrowed by them from his estate. Ex parte Coster's
Executors.

Another instructive case, illustrating the rule now under consideration, is afforded by *Ex parte Brown* (o). There, in substance, there were two firms, with a common partner, viz., A. and B., and A. and C.; C. had made himself separately liable for a debt owing by A. and B.; both firms became bankrupt. The principal creditor proved against C.'s separate estate, and received a dividend. A claim was then made on behalf of C.'s separate estate, to prove for the amount thus paid out of it against the joint estate of A. and B. But it was held that this proof could not be allowed, for the principal creditor not having been paid in full, he had Two firms with
common partner.
Ex parte Brown.

(n) 8 Jur. N. S. 629. See, also, *Ex parte Hill*, 3 M. & A. 175, and *Ex parte Crofts*, 2 Deac. 102, where trust money lent to partners was held to be proveable as a joint debt. (o) 2 M. D. & D. 718. See, too, *Ex parte Rawson*, Jac. 274.

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a right of proof against the joint estate of A. and B., and that, consequently, C. could not diminish that estate to his prejudice.

Exceptions to
rule that partner
cannot compete
with his own
creditors.

There are, however, three exceptions to the rule above stated, viz. :

1. Where the separate property of one partner has been fraudulently dealt with as the property of the firm ;

2. Where there are two distinct trades, carried on by the firm, and by one or more of the members of it, with distinct capitals ;

3. Where a partner has obtained his order of discharge, and has afterwards become a creditor of the firm (*p*).

This last exception rests on the principle that the discharged partner is no longer a debtor to the creditors of the firm, and does not, therefore, fall within the rule which precludes a person from competing with his own creditors. The two first exceptions are not so easily explained.

Exception in the
case of fraud.

Exception in the case of fraud.—If separate property of one partner has been fraudulently converted by his co-partners to the use of the firm, such property must be treated as the separate estate of the defrauded partner ; and proof on his behalf (or rather on behalf of his separate estate) is therefore allowed in respect of such property, against the joint estate, and in competition with the joint creditors (*q*). Upon precisely the same principle, if a partner has fraudulently converted property of the firm to his own use, proof on behalf of the joint estate is allowed, in respect of such property, against his separate estate, and in competition with his separate creditors (*r*). This, however, is a subject which will have to be considered hereafter.

Exception in the
case of distinct
trades.

Exception in the case of distinct trades.—If one of two firms, carrying on distinct trades, becomes creditor of the other in the ordinary way of their trade, the creditor firm may prove against the joint estate of the debtor firm, in competition with

(*p*) *Ex parte Atkins*, Buck, 479, where a partner who had obtained his certificate took up bills of the firm.

parte Sillitoe, 1 Gl. & J. 382, and in *Ex parte Harris*, 1 Rose, 437.

(*r*) *Ex parte Lodge v. Fendall*, 1 Ves. J. 166.

(*q*) See *per* Lord Eldon in *Ex*

its other joint creditors, although one or more persons may be partners in both firms (s). Bk. IV. Chap. 2.
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If neither firm contains the other, *e.g.*, if one firm is A. and B., and the other firm is A. and C., either may rank as a joint creditor of the other, because the creditors of the one are not creditors of the other (t).

If one of the firms contains the other, *e.g.*, if one firm is A., B., and C., and the other is A. and B., or A. only, two cases have to be considered, according as the larger or the smaller firm is the debtor to the other; for whilst all persons who are creditors of the larger firm are creditors of the smaller, the converse is evidently not true. Consequently, although the larger firm does not compete with its own creditors if it proves against the joint estate of the smaller firm, the smaller firm must necessarily compete with its own creditors if it is allowed to rank as a joint creditor against the estate of the larger firm. Hence, although it was long ago decided that proof might be made by the larger firm against the smaller (u), it was also decided that proof could not be made by the smaller against the larger (x). However, it seems now settled that if the two trades are distinct, and if the larger firm has become indebted to the smaller in the regular way of their trades (y), the smaller firm may prove, like any other joint creditor, against the joint estate of the larger. This was decided in *Ex parte Cook* (z), where one partner, who carried on a separate business, was allowed to rank as a joint creditor against the joint estate of the firm of which he was a member, and which had become indebted to him in the ordinary way of their and his respective trades. Case where one
firm contains
the other.

The exception now under discussion is, however, only allowed provided two things concur, viz.: first, there must be two distinct trades; and secondly, the debt sought to be proved The trades must
be distinct, and
the debts have
been contracted
in the ordinary
course of them.

(s) See, in addition to the cases 413; *Ex parte Castell*, 2 Gl. & cited below, *Ex parte Ring*, *Ex parte Freeman*, *Ex parte Johns*, 146. cited in Cooke's Bank. Law. 534, ed. 8.

(t) *Ex parte Thompson*, 3 Deac. & Ch. 612. (x) *Ex parte Hargreaves*, 1 Cox, 440; *Ex parte Adams*, 1 Rose, 305; *Ex parte Sillitoe*, 1 Gl. & Jam. 382.

(u) *Ex parte St. Barbe*, 11 Ves.

(y) This is essential, see *infra*.

(z) *Mont*. 228.

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Ex parte Wil-
liams.

Case where part-
nership has not
commenced.

Ex parte Tur-
quand.

must have arisen from dealings between trade and trade in the ordinary way of business. It was because the two firms were, in fact, one, the smaller one being only a branch of the larger, and carrying on *its* business, that proof was disallowed in *Ex parte Hargreaves* (a); and it was because, although the two firms and their trades were distinct, the debt sought to be proved had not arisen in the ordinary way of trade that proof was disallowed in *Ex parte Sillitoe* (b), and in *Ex parte Williams* (c). In this last case there was a firm of iron-masters; two of the firm were also bankers; the iron firm was indebted to the banking firm for advances, but proof in respect of them on behalf of the banking firm against the joint estate of the iron firm was disallowed, inasmuch as the circumstances under which the debt was contracted precluded the idea that the bankers had made the advances in the ordinary way of their business as bankers.

The rule which precludes one partner from proving against the estates of his co-partners does not apply to persons who have not become partners, and who have not rendered themselves liable to third parties as if they were partners. This is well illustrated by *Ex parte Turquand* (d). There, in substance, A. agreed to become a partner with B. and C., who were already in partnership together, and who carried on business in the names of B. and C. It was agreed that A. should bring in 2000*l.*, and that the name of the firm should be altered to B., C. & Co. A. advanced 2000*l.* to B. and C.; the name of the firm was altered as arranged, but no articles of partnership were ever signed, and A. refused to sign any or to do anything more before he was satisfied as to B. and C.'s solvency. There was no evidence to show that A. had made himself liable to third parties as if he were a partner; and B. and C. having become bankrupt, A. was allowed to prove against their estate for the advances he had made them.

(a) 1 Cox, 440. See *ante*, p. 1168.

(b) 1 Gl. & J. 382. See *ante*, p. 1168.

(c) 3 M. D. & D. 433.

(d) 2 M. D. & D. 339. See also *Ex parte Davis*, 9 Jur. N. S. 859,

ante, vol. i. p. 30. *Ex parte Hickin*, 3 De G. & S. 662, shows that a person intending to become a partner, may prove as a creditor for arrears of salary.

Thirdly, with respect to the separate creditors.

The principle which prohibits a partner from competing with the joint creditors of the firm evidently has no application as between one partner and the separate creditors of his co-partners. Moreover, the lien which each partner has upon the assets of the firm must be satisfied before any part of the joint estate can be divided amongst the members of the firm, or, which comes to the same thing, be carried to the account of their respective separate estates. Therefore, after the joint debts of the firm have been paid, with interest, the surplus of the joint estate must be next applied in satisfaction of the liens of the individual partners upon it (*e*), and it is the ultimate surplus only which is to be divided amongst the partners, or their respective separate estates, in proportion to their respective shares in the assets of the firm. It is hardly necessary to observe that a lien existing in favour of one partner increases his separate estate, and confers upon his separate creditors a right to prove against the joint estate in preference to the separate creditors of the other partners, who have no such lien (*f*). If the joint estate is not sufficient to satisfy the lien, the deficiency becomes proveable against the separate estates of the indebted partners (*g*).

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3. Position of
separate credi-
tors.

The joint debts being paid, and the liens of the individual partners on the partnership assets being satisfied, the surplus of the joint estate becomes divisible amongst the respective separate estates of the partners in proportion to their respective shares in the partnership property. The surplus of the joint estate, having been thus distributed, loses its character of joint estate, and becomes, to all intents and purposes, separate estate of the partners to whose credit it is carried. If any joint estate is carried to a separate estate before the joint debts are

Surplus of joint
estate.

(*e*) *Ex parte King*, 17 Ves. 115, and 1 Rose, 212; *Ex parte Reid*, 2 Rose, 84; *Ex parte Reeve*, 9 Ves. 588; *Ex parte Terrell*, Buck, 345; *Fereday v. Wightwick*, Tambl. 250; *Holderness v. Shackels*, 8 B. & C. 612.

(*f*) *Ex parte King*, 17 Ves. 115; *Ex parte Reid*, 2 Rose, 84.

(*g*) *Ex parte Terrell*, Buck, 345; *Ex parte King*, 17 Ves. 115; *Ex parte Watson*, Buck, 449, and 4 Madd. 477; and see as to the last case, 2 Gl. & J. 172.

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paid and the partners' liens are satisfied, such joint estate will be ordered to be restored (*h*).

B. *Proof against the separate estates.*

Administration
of separate estate
of partners.

The principles according to which the separate estate of one partner is administered, in the event of an adjudication against him alone, are the same as those which govern the administration of the separate estates of the members of a bankrupt firm (*i*). The leading principle in administering a separate estate is to prefer separate to joint creditors, just as in administering joint estate the leading principle is to prefer joint to separate creditors. But there is this important difference to be borne in mind; the separate creditors of one partner are not creditors of the firm, whilst the joint creditors of the firm are creditors of each of the partners composing it. For this reason it was formerly the rule to distribute the separate estate of each partner, *pari passu*, amongst his creditors, whether joint or separate (*k*); and although this rule has been departed from (*l*), the distinction in question naturally leads to important consequences, as will be seen hereafter.

The administration of the separate estates of bankrupt partners, and the administration of the separate estate of one bankrupt partner, if one alone is bankrupt, will be best explained by examining

1. The rights of the separate creditors,
2. The rights of the joint creditors,
3. The rights of the partners,

as against such estates or estate.

(*h*) See *Ex parte Lanfear*, 1 Rose, 442.

(*i*) 12 & 13 Vict. c. 106, § 140; and 54th Order in Bankruptcy; *Ex parte Taitt*, 16 Ves. 197; *Ex parte Backhouse*, 10 Ves. 98.

(*k*) *Ex parte Blake*, Cooke's Bank. Law, 528, ed. 8; *Ex parte Cobham*; *Ex parte Haydon*; *Ex parte Caruthers*; *Ex parte Upton*; *Stephens v. Brown*, and *Mathews v. Aland*, all

cited in Cooke's Bank. Law, 260—264, ed. 8; and see *Lord Craven v. Widdows*, Ca. in Ch. 139; *Ex parte Copland*, 1 Cox, 420; *Ex parte Hodgson*, 2 Bro. C. C. 5; *Ex parte Page*, ib. 119; *Ex parte Flintum*, ib. 120.

(*l*) See next note, and *Ex parte Baudier*, 1 Atk. 98; *Ex parte Olk-now*, Cooke's Bank. Law, 259, ed. 8.

First, with respect to the separate creditors.

Excepting in those cases which will be specially noticed hereafter, the separate estate of each partner is to be first applied in payment of his separate creditors (*m*), to the extent of 20s. in the pound on the principal monies owing to them. But separate creditors are not entitled to interest until the joint creditors have also received 20s. in the pound on the principal monies owing to them (*n*).

After payment of the separate creditors of each partner, the surplus of his separate estate is carried to the credit of the joint estate (*o*); and if the partner is a member of several bankrupt firms, the surplus of his separate estate must be divided amongst their respective joint estates, in proportion to the amount of the debts proved against them respectively (*p*).

Secondly, with respect to the joint creditors.

Excepting in the cases hereafter mentioned, the joint creditors of partners (*q*) are not entitled to payment out of their separate estates, in competition with their separate creditors. This rule is now so well established that it is useless to refer particularly to the cases illustrating it (*r*), and it is proposed, therefore, to notice at once the exceptions to the rule. These exceptions are four in number. The first exists in favour of

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1. Position of
separate credi-
tors.

2. Position of
joint creditors.

Cases in which
they may com-
pete with the
separate credi-
tors.

(*m*) 12 & 13 Vict. c. 106, § 140; 54th Rule in Bankruptcy, *Ex parte Elton*, 3 Ves. 238; *Ex parte Abell*, 4 Ves. 837; *Ex parte Clay*, 6 Ves. 813; *Ex parte Taitt*, 16 Ves. 193.

(*n*) *Ex parte Wood*, 5 Jur. 1115; *Ex parte Wood*, 2 Mont. D. & D. 283; *Ex parte Clarke*, 4 Ves. 677; *Ex parte Boardman*, 1 Cox, 275; *Ex parte Minchin*, 2 Gl. and Jam. 287. See, too, *Ex parte Rix*, Mont. 237; and as to interest in bankruptcy, *Re Higginbottom*, 2 Gl. & J. 123; *Ex parte Paton*, 1 ib. 332.

(*o*) *Ex parte Wood*, 5 Jur. 1115, where the surplus of the separate

estate of a bankrupt shareholder in a company being wound up by a suit in equity was held applicable to the payment of the creditors of the company, and not payable into court in the suit.

(*p*) *Ex parte Franklyn*, Buck, 332, where the order is given at length.

(*q*) As to co-debtors not partners, see *Ex parte Field*, 3 M. D. & D. 95; *Ex parte Buckingham*, 1 M. D. & D. 235; *Ex parte Crosfield*, 1 Deac. 405.

(*r*) They are collected in the preceding notes.

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the petitioning creditor; the second where there is no joint estate; the third where the property of the firm has been fraudulently converted; and the fourth where there has been a distinct separate trade, in respect of which a separate debt has been contracted.

Exception in
favour of peti-
tioning creditor.

Exception in favour of the petitioning creditor.—If one member only of a firm is made bankrupt on the petition of a creditor of the firm, the petitioning creditor ranks as a separate creditor against the separate estate of the bankrupt (s). The reason for this is, that all the creditors who prove in the bankruptcy take advantage of the adjudication procured by the petitioning creditor, and they ought not therefore to be allowed to claim priority over him, and so obtain the benefit of what he has done, to his prejudice and perhaps total exclusion. If, indeed, the petition is against the bankrupt as “surviving partner,” then the petitioning creditor is deemed to petition as a joint creditor for adjudication against the firm, and he is treated accordingly and not allowed to rank as a separate creditor (t).

It may be observed that a joint creditor obtaining a separate adjudication does not forfeit his debt by receiving joint estate on account thereof, although he may receive it from the bankrupt (u).

Exception where
there is no joint
estate.

Exception where there is no joint estate.—If in the case of a bankrupt firm there is no joint estate, the joint creditors are entitled to rank as separate creditors against the separate estates of the individual partners (x). So if one partner only is bankrupt, the creditors of the firm are entitled to rank as separate creditors against the separate estate of the bankrupt, if there is no joint estate (y), and if there is no solvent osten-

(s) *Ex parte Hall*, 9 Ves. 349; 309.

Ex parte Ackerman, 14 Ves. 604;

Ex parte De Tastet, 17 Ves. 247;

Ex parte Burnett, 2 M. D. & D.

357, reversing S. C., 1 ib. 608,

where the petitioning creditor was

a joint creditor in respect of one

demand, and a separate creditor in

respect of another.

(t) *Ex parte Barned*, 1 Gl. & J.

(u) *Ex parte Smith*, 3 M. D. & D. 144.

(x) See the next note.

(y) See *Ex parte Hayden*, 1 Bro.

C. C. 453; *Ex parte Sadler*, 15 Ves.

52; *Ex parte Bradshaw*, 1 Gl. &

Jam. 99; *Ex parte Bauerman*, 3

Deac. 476, and the next three

notes.

sible partner (z), or at all events none in this country (a). The fact that the estate of a deceased partner is solvent will not deprive the joint creditor of his right against the separate estate of the bankrupt; because, the legal remedy surviving against the latter, the creditor has no *locus standi* at law against the representatives of the deceased (b). Again, if several firms enter into a joint adventure and one of them becomes bankrupt, the joint creditors of all the firms may prove against the joint estate of the bankrupt firm, if the partners in the solvent firms are abroad and there are no assets belonging to all the firms jointly (c).

If there is any joint estate, however small, the joint creditors will not be permitted to rank *pari passu* with separate creditors against the separate estate (d). But joint property which is pledged for more than its value, or which for any other reason cannot to any extent be made available for the benefit of the creditors of the firm, is treated, with reference to the rule in question, as having no existence (e). In *Ex parte Geller* (f), it was accordingly held that a joint creditor who had sold property of the firm, which had been pledged to him for more than its value, might, there being no other joint property, prove so much of his debt as remained unpaid against the separate estates of the partners. A joint creditor holding a pledge belonging to the firm must sell it before he can claim to rank

Joint estate
small.

Ex parte Geller.

(z) See *Ex parte Kensington*, 14 Ves. 447; *Ex parte Jansen*, 3 Madd. 229. The existence of a dormant partner is immaterial, see *Ex parte Chuck*, 8 Bing. 469; *Ex parte Hodgkinson*, 9 Ves. 294; *Ex parte Norfolk*, ib. 458.

(a) *Ex parte Pinkerton*, 6 Ves. 814, n.

(b) *Ex parte Bauerman*, 3 Deac. 476. The creditors of the survivor cannot insist on the creditors of the firm going against the estate of the deceased; because there is no marshalling except as between creditors of one and the same debtor. See acc. *Ex parte Kendall*, 17 Ves. 514.

(c) *Ex parte Nolte*, 2 Gl. & J. 295 (overruling *Ex parte Wylie*, 2 Rose, 393); *Ex parte Machell*, 1 Rose, 447.

(d) *Ex parte Kennedy*, 2 De G. Mac. & G. 228; *Ex parte Peake*, 2 Rose, 54; *Ex parte Harris*, 1 Madd. 583. Compare *Ex parte Burdekin*, 2 M. D. & D. 704; *Ex parte Birley*, ib. 354.

(e) See *Ex parte Peake*, 2 Rose, 54; *Ex parte Hill*, 2 Bos. & P. N. R. 191; but see *Ex parte Clay*, 1 Mont. Part. 223, note; *Ex parte Kennedy*, 2 De G. Mac. & G. 228.

(f) *Ex parte Geller*, 2 Madd. 262.

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as a separate creditor, for until he has done that he is not in a position to say that there is no joint estate (*g*).

If it is doubtful whether there is any joint estate or not, an inquiry will be directed (*h*).

Reimbursing
separate estate
on subsequent
realisation of
joint estate.

If joint creditors prove against the separate estate of any partner, and obtain a dividend thereout upon the assumption that there is no joint estate, and joint estate is afterwards realised, the separate estate is entitled to be repaid the amount paid to the joint creditors (*i*).

Joint creditors
may pay separate
creditors.

Joint creditors can acquire a right to prove against the separate estate of any partner by paying his separate creditors 20s. in the pound on the amount of the principal monies due to them (*k*).

Exception in
cases of fraud.

Exception in the case of fraud.—It has been already seen that if a partner's separate property has been fraudulently converted by his co-partners to the use of the firm which becomes bankrupt, the property so converted cannot be treated as part of the joint estate, but must be placed to the separate account of the defrauded partner (*l*). Upon the same principle, if a partner has fraudulently converted to his own use property, which in truth belongs to the firm, such property cannot be treated as part of his separate estate, but as forming part of the joint estate of the firm. Hence, as in the former case proof on behalf of the separate estate is admitted against the joint estate (*m*), so in the latter case, if the firm is bankrupt, proof on behalf of the joint estate is admitted against the separate estate (*n*); and if the firm is not bankrupt, proof on behalf of the solvent partners is admitted against the estate of their

(*g*) This follows from *Ex parte Smith*, 2 Rose, 64; *Ex parte Barclay*, 1 Gl. & J. 272, and cases of that class. In *Ex parte Hill*, 2 B. & P. N. S. 191, note, the pledge had been sold, and the creditor proved for the difference.

(*h*) *Ex parte Birley*, 1 M. D. & D. 387; and see S. C., 2 ib. 354.

(*i*) See *Ex parte Willock*, 2 Rose, 392.

(*k*) See *Ex parte Chandler*, 9 Ves.

35, and *Ex parte Taitt*, 16 Ves. 193.

(*l*) *Ante*, p. 1170.

(*m*) *Ex parte Harris*, 2 V. & B. 210; S. C., 1 Rose, 437; *Ex parte Sillitoe*, 1 Gl. & J. 382.

(*n*) *Ex parte Lodge and Fendall*, 1 Ves. J. 166; *Ex parte Smith*, 1 Gl. & Jam. 74; *Ex parte Watkins*, Mont. & McA. 57; *Ex parte Cust*, Cooke's Bank. Law, 531, ed. 8.

bankrupt co-partner (*o*). In this last case, moreover, the solvent partners rank as separate creditors, although the property fraudulently appropriated by the bankrupt belonged not to them exclusively but to them jointly with himself. Prior to the bankruptcy they might, by bill against him, have compelled him to replace the money fraudulently abstracted by him, and that equity is not shaken by the bankruptcy. In bankruptcy the administration of the estate is both legal and equitable, and although the solvent partners are impeded by the technical form of proceedings at law from suing the bankrupt for the recovery of the property in question, he is in equity clearly accountable to them for it, and they are therefore entitled to prove as creditors against his estate (*p*).

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Whether in any particular instance there has been a fraudulent misappropriation of the partnership property or not must of course be determined by the facts of each case. It may, however, be observed that the mere circumstance that one partner is indebted to the firm is no evidence of fraud; and even if he has acted in violation of the articles of partnership, it may be found that those articles have by common consent been habitually ignored. To bring a case within the exception now under consideration, the individual partner must in effect have stolen the property of the firm, and his breach of good faith must not have been acquiesced in or condoned by his co-partners (*q*). Any arrangement by which a debt arising from fraud is made a matter of mere partnership account, precludes the firm from ranking, in respect of that debt, as a separate creditor against the separate estate of the individual partner (*r*).

No sufficient
fraud.

The leading cases on this subject are *Fordyce's case* and *Ex parte Lodge and Fendall*.

In *Fordyce's case* (*s*), A., B., C., and D. were partners as bankers, and had in the course of their business discounted a

Fordyce's case.

(*o*) *Ex parte Yonge*, 3 V. & B. 31, and 2 Rose, 40. The judgment in this case is very masterly. 4 D. & Ch. 169; *Ex parte Crofts*, 2 Deac. 102; *Ex parte Hinds*, 3 De G. & Sm. 613.

(*p*) *Ex parte Yonge*, 3 V. & B. 31, and 2 Rose, 40. (*r*) See the judgment of Erskine, C. J., in *Ex parte Turner*, 4 D. & C. 169.

(*q*) See *Ex parte Yonge*, 3 V. & B. 31; *Ex parte Smith*, 1 Gl. & J. 74, and 6 Madd. 2; *Ex parte Turner*, (*s*) Also known as *Ex parte Cust*, Cooke's Bank. Law, 531, ed. 8.

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number of bills and notes, which had thus become the property of the firm. A. fraudulently applied to his own use some of these bills and notes. He was subsequently adjudged bankrupt, and shortly afterwards the firm itself was adjudged bankrupt. The assignees of the firm claimed to prove as separate creditors of A., in competition with his other separate creditors and against his separate estate, for the value of the bills and notes thus abstracted, and they were allowed so to do. But in this same case the assignees were not allowed to prove against A.'s separate estate for what the joint estate had been compelled to pay in respect of bills issued by him in the partnership name for private purposes of his own.

Ex parte Lodge
and Fendall.

In *Ex parte Lodge and Fendall* (t), the facts were in substance as follows. John Lodge and his two sons, James and John, were partners. John Lodge, the father, died, having bequeathed his residuary personal estate to his two sons, and appointed them and their mother his executors. After the death of the father, his two sons continued to carry on the old business together for two years, when they dissolved partnership. No accounts were taken, but it was arranged that James should pay the debts of the firm. James immediately entered into a new partnership with Fendall. Fendall brought in 12,000*l.* as his share of the capital, and James Lodge brought in the same amount in stock and goods. After this, James Lodge, without Fendall's knowledge or consent, applied the assets of the new firm in paying the debts of the old firm, and the private debts of himself, James Lodge. Ultimately James Lodge and his partner Fendall became bankrupt. The joint creditors of the two partners Lodge and Fendall petitioned for liberty to prove against James Lodge's separate estate, and in competition with his separate creditors, for the amount of the assets of Lodge and Fendall thus improperly applied. Lord Thurlow, relying on *Fordyce's case*, expressed a strong opinion in favour of the proof, and allowed it *de bene esse*. But after taking time to consider, his Lordship "thought he could not permit the assignees under the joint commission to prove against the separate estate of Lodge, without deciding upon a principle that

(t) 1 Ves. J. 165, and Cooke's Bank. Law, 530, ed. 8.

must apply to all cases, and constantly occasion the taking an account between the partners and the partnership in every joint bankruptcy. He said that if the affidavits had gone the length of connecting the bankruptcy with the institution of the partnership trade, and that Lodge, with a view of swindling Fendall out of his property, had got him into the trade, and then taken the effects of the partnership into his own hands with a view to his separate creditors, it might have been different. The petition on the part of the joint creditors, to prove against the separate estate, was dismissed" (u).

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Exception in the case of distinct trades.—The same principle which, in the event of the bankruptcy of a firm, allows proof to be made on behalf of one of its members against its joint estate, in respect of a debt contracted by the firm to him as a distinct trader (x), also allows proof to be made on behalf of the joint estate of a firm against the separate estate of one of its partners, who has carried on a trade distinct from that of the firm, and has become indebted to it in the ordinary course of his distinct trading. If, therefore, a person who is a partner in a trading firm carries on a distinct trade of his own, and becomes indebted to the firm for goods sold to him in the way of their trades and then becomes bankrupt, the firm is treated as a separate creditor for the debt so contracted, and is allowed to prove accordingly (y). So, in the case of a bankrupt firm, proof for debts thus contracted by an individual partner is allowed as between the joint estate of the firm and the separate estate of that partner, in competition with his separate creditors (z). As Lord Eldon put it in *Ex parte St. Barbe*, "a joint trade may prove against a separate trade, but not a partner against a partner." But although there may have been distinct trades, still if the debt in question has not been contracted in the ordinary course of carrying them on, such proof will not be allowed (a).

Exception in
cases of distinct
trades.

(u) The passage in inverted commas is taken from Cooke's Bank. Law, 530, ed. 8. See further as to the necessity of fraud, *Ex parte Grill*, ib.

(x) *Ante*, pp. 1170 *et seq.*

(y) *Ex parte Hesham*, 1 Rose,

146; *Ex parte Castell*, 2 Gl. & J. 124; *Ex parte Johns*, Cooke, B. L. 538, and Wats. Part. 286.

(z) *Ex parte St. Barbe*, 11 Ves. 413.

(a) See as to this, *ante*, p. 1172, and *Ex parte Hargreaves*, 1 Cox,

Thirdly, with Respect to the Partners.

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3. Position of
the partners.

The principle that a debtor shall not be allowed to compete with his own creditors, is as strictly carried out in administering the separate estates of individual partners, as in administering the joint estate of a firm. The separate estate of each partner is liable to the debts of the firm, subject only to the prior claims of his separate creditors; whence it is obvious that one partner cannot compete with the separate creditors of his co-partner, without in fact diminishing the fund which, subject to their claims, is applicable to the payment of the joint debts, and therefore of his own creditors. In other words, the rights of the joint creditors preclude one partner from ranking as a separate creditor of his co-partner, until the joint creditors are paid in full (*b*). Moreover, it is now settled, in opposition to some older cases (*c*), that a solvent partner is not entitled to rank as a creditor against the estate of his bankrupt co-partner upon indemnifying that estate against the claims of the joint creditors: he must show that those claims are discharged or otherwise barred (*d*).

Assignee of solvent partner.

Although a partner cannot prove against his co-partner so long as the joint debts are unpaid, yet, if a debt owing by the bankrupt partner to his co-partner has been cancelled, and in consideration thereof the bankrupt has taken upon himself a debt due from his co-partner to a third party, this debt, so substituted for the first, may be proved by such third party, in competition with the other separate creditors of the bankrupt, whether the joint creditors are paid or not (*e*).

Proof by firm
against estate
of bankrupt
partner.

The disability of a partner to prove in competition with his own creditors, prevents proof by a firm to which he belongs against his own separate estate; for proof by such a firm is

- 440; *Ex parte Sillitoe*, 1 Gl. & J. 382; *Ex parte Williams*, 3 M. D. & D. 433, there cited.
- (b) See, accordingly, *Ex parte Collinge*, 9 Jur. N. S. 1212, L. C.; *Ex parte Carter*, 2 Gl. & J. 233; *Ex parte Ellis*, ib. 312; *Ex parte Rawson*, Jac. 274; *Ex parte Robinson*, 4 D. & Ch. 499; *Ex parte May*, 3 Deac. 382.
- (c) Viz., *Ex parte Taylor*, 2 Rose, 175; *Ex parte Ogilvie*, ib. 177.
- (d) *Ex parte Moore*, 2 Gl. & J. 166.
- (e) *Ex parte Todd*, De Gex, 87.

obviously nothing more than proof by himself and co-partners (f).

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The principle which allows joint estate to prove against separate estate, and separate estate to prove against joint estate, in cases where there has been a fraudulent conversion of property, or where there have been distinct trades, and a debt contracted in the course of those trades, is also applicable to proofs by one partner against another, in similar cases (g). Moreover, if A., intending to become partner with B., advances him money as his, A.'s share of the common stock, and before the partnership is entered into, B. becomes bankrupt, A. may prove against B.'s separate estate, as a separate creditor for the amount of the advance, unless A., without being a partner, has made himself liable to creditors as if he were one (h).

At one time it was supposed that when a person had been induced by the fraud of another to join him in partnership, the former could not, on the bankruptcy of the latter, prove against his separate estate, for the amount paid to the bankrupt as a consideration for the partnership. This opinion was founded on the case of *Ex parte Broome* (i). There A. was induced, by the false and fraudulent representations of B., to enter into partnership with him, and to pay him a considerable premium. Shortly afterwards, B. became bankrupt, and A. sought to recover out of B.'s estate the amount of the premium paid as above mentioned. According to the report this was refused, upon the ground that, although A. might be entitled to recover the money as between himself and B., yet he was liable with B. to third persons, viz., the creditors of the firm.

Partnership induced by fraud.

Ex parte Broome.

The report of this case, however, is not warranted by the order which was actually made in it (k). Indeed, the order expressly directed that A. should be at liberty to prove against B.'s estate, and that A. should be paid a dividend

(f) See acc. *Ex parte Smith*, 1 Gl. & J. 74, and 6 Madd. 2; *Ex parte Turner*, 4 D. & Ch. 169.

(g) See *ante*, p. 1170.

(h) *Ex parte Turquand*, 2 M. D. & D. 339, *ante*, p. 1172; and as to

money payable to a person in lieu of his being taken into partnership, see *Ex parte Megarey*, De Gex, 167.

(i) 1 Rose, 69.

(k) See the order in 1 Coll. 598.

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Proof by com-
pany against
estate of share-
holder.

Ex parte Mars-
ton.

Ex parte Law.

Ex parte Snape.

Ex parte Da-
vidson.

in respect of his proof, rateably with B.'s other creditors. This order is in conformity with the opinion expressed by Lord Thurlow, in *Ex parte Lodge and Fendall*, and, with the cases of *Hamil v. Stokes* (l), and *Bury v. Allen* (m).

The application of the foregoing doctrines to cases where a shareholder in a company has become bankrupt, and the company seeks to prove as a creditor against his separate estate, and in competition with his other separate creditors, requires a few remarks. In *Ex parte Marston* (n), it was held that, on the bankruptcy of a member of a banking company, governed by 7 Geo. 4, c. 46, a creditor of the company was entitled to prove his debt for the purpose of voting in the choice of assignees, and of assenting to, or dissenting from, the certificate of the bankrupt, and taking any surplus of his estate, after payment of his separate creditors. In *Ex parte Law* (o), the public officer of such a company was allowed to prove against the joint estate of a firm of three partners, for a debt owing by the firm to the company, although the company was itself insolvent, and two of the three partners were shareholders in the company. But in this case, there was a strong intimation of opinion that the public officer could not have proved against the separate estate of a member of the company, so long as the debts of the company were themselves unpaid. In *Ex parte Snape* (p), the public officer of a similar company was not allowed to prove against the separate estate of a bankrupt member for calls due to the company; the decision in this case was based, partly on the ground that the calls did not constitute a proveable debt, and partly on the ground that it was, in substance, an attempt by one partner to prove against his co-partner, whilst joint debts remained unpaid. These cases were reviewed in *Ex parte Davidson* (q),

(l) Dan. 20, and 4 Price, 166.
See on this case 1 Mont. Part. 210.

(m) 1 Coll. 589.

(n) Mon. & Ch. 576. *Ex parte Prescott*, ib. 611. Compare *Davidson v. Farmer*, 6 Ex. 242, which shows that the creditors of such a company have no *locus standi* in bankruptcy against its members

until judgment has been obtained against the public officer.

(o) Mon. & Ch. 590, and 1 M. D. & D. 16.

(p) Mon. & Ch. 607.

(q) 1 M. D. & D. 648, and on appeal, sub nomine *Re Caldecott*, 2 ib. 368.

and it was there held that the public officer of a banking company, governed by 7 Geo. 4, c. 46, might prove against the separate estate of one of its members for what was due from him as a customer of the company, in respect of his overdrawn account, although the company was itself indebted to other persons. This case may be said to have settled the doubts previously entertained, and to have established a difference between partnerships and companies which, although unincorporated, are empowered to sue and be sued by public officers; and it may now be taken, that, where a member of such a company, and *à fortiori*, where the member of an incorporated company becomes bankrupt, the company, whether its debts are paid or not, may prove as a separate creditor of such member for what is due from him to it, either in respect of calls (*r*) or other matters (*s*). But the company, if it holds a security of the bankrupt for what is so due, must realise the security, and prove for the difference, as in ordinary cases (*t*).

Hitherto the right of one partner to rank as a separate creditor of his co-partner, has been considered solely with reference to joint creditors; it is necessary, however also to notice it with reference to separate creditors. They are obviously benefited by the rule which prevents one partner from proving against the separate estate of his co-partner; but it is not for their sake that such rule has been established, and where the reason for the rule ceases to exist, the rule itself ceases to be applicable. Hence, if there never were any joint debts, or if all those which once existed have ceased to exist, either because they have been paid, barred, satisfied, or converted into separate debts, then one partner who is a creditor of another, may, on the bankruptcy of the latter,

One partner may rank as a separate creditor of his co-partner, provided the joint creditors are not prejudiced.

(*r*) *Ex parte Brown*, 3 De G. & S. 590; *Ex parte Nicholas*, 2 De G. Mac. & G. 271. See 19 & 20 Vict. c. 47, § 90.

(*s*) *Ex parte Davidson*, 1 M. D. & D. 648, and 2 ib. 368; *Ex parte Cooper*, 2 M. D. & D. 1; *Ex parte Wallis*, ib. 201. *Ex parte Wood-*

roffe, Fonbl. Bank. Ca. 14, cannot be supported.

(*t*) *Ex parte Cooper*, 2 M. D. & D. 1; *Ex parte Wallis*, ib. 201; *Ex parte Connell*, 3 Deac. 201, where the security consisted of shares in the company.

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prove against his separate estate in competition with his other separate creditors.

Ex parte Grazebrook.

A leading case on this subject is *Ex parte Grazebrook* (u); there a dormant partner had retired, and the continuing partner continued the business and was adopted as the sole person liable to pay the debts formerly due from the firm. On the retirement of the dormant partner, the accounts of the firm were taken and settled, and a balance was found due to him. On the bankruptcy of the continuing partner, the dormant partner was allowed to prove as a separate creditor, for the amount of the balance so found due, although there were partnership debts still unpaid, because these debts had been converted into the separate debts of the continuing partner, and by the statement of the account, the latter had become debtor for the balance in question to his late co-partner.

Effect of paying joint debts.

Again, if one partner has paid the joint debts, he is entitled to prove as a separate creditor of his co-partner for the amount of the share which ought to have been paid by him (x); and it is immaterial whether the debts have been paid before or since the bankruptcy (y).

In cases of this sort, moreover, the amount proveable against each bankrupt is ascertained, not by dividing the whole amount of the debts paid by the number of partners, or by the number of shares held by them, without reference to their ability to pay, but by treating each partner as liable to contribute his own share, calculated as above, and also to contribute, as surety for the rest, to the payment of what is due from them, but which they are themselves unable to pay. Those, in fact, who can pay, must make up for those who cannot (z).

(u) 2 D. & Ch. 186. See, too, *Ex parte Gill*, 9 Jur. N. S. 1303; *Ex parte Hall*, 3 Deac. 125. In *Ex parte Dodgson*, Mont. & MacAr. 445, there were no joint debts. So in *Ex parte Davis*, 9 Jur. N. S. 859, noticed *ante*, p. 30.

(x) See *Ex parte Watson*, 4 Madd. 477; *Ex parte Carpenter*, Mont. & MacAr. 1; *Wood v. Dodgson*, 2 M.

& S. 195. In the two last cases the partner who had paid the debts had retired and been indemnified against them by the bankrupt.

(y) See, in addition to the cases in the last note, *Moody v. King*, 2 B. & C. 558; *Parker v. Ramsbottom*, 3 B. & C. 257; *Ex parte Young*, 2 Rose, 40.

(z) See *Ex parte Hunter*, Buck,

Again, although where one partner is indebted to the firm, and the lien upon his share is insufficient to satisfy such debt, the deficiency cannot be proved against his separate estate in competition with the joint creditors of the firm, or until they are paid (a); yet such deficiency is proveable against his separate estate in competition with his separate creditors, where the rights of the joint creditors do not intervene (b).

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Proof for what
is not satisfied
by lien.

Further, if the separate estate of a partner is clearly insufficient to pay his separate debts excluding that which he owes to his co-partner, the latter is entitled to prove; for, *ex hypothesi*, there is no possibility of any surplus out of which the joint creditors can be paid anything whatever. They therefore are in no way prejudiced by the proof (c).

Separate estate
insolvent.

Before leaving this subject, it may be remarked, that where one partner only is bankrupt, and his assignees administer the joint estate of the firm, as well as the separate estate of the bankrupt, and there is an ultimate surplus, that surplus ought to be divided between the bankrupt and the solvent partners, according to their respective interests therein.

Surplus of joint
estate when ad-
ministered under
a separate ad-
judication.

In *Ex parte Lanfear* (d) one of two partners became bankrupt, and the other died. The bankrupt partner having paid all his creditors 20s. in the pound, the surplus of the joint and of his separate estate was ordered to be paid over to him, and it was paid over accordingly. The executor of the deceased partner, however, applied for an order that the bankrupt might account for what was due to the deceased in respect of his interest in the surplus of the joint estate, and that the money which had been restored might be paid into court, and an order to that effect was made accordingly.

Ex parte Lan-
fear.

552; *Ex parte Moore*, 2 Gl. & J. 172; *Ex parte Plowden*, 2 Deac. 456, and 3 M. & A. 402, overruling *Ex parte Watson*, Buck, 449, and *Ex parte Smith*, ib. 492.

(a) *Ex parte Carter*, 2 Gl. & J. 223; *Ex parte Ellis*, ib. 312; *Ex parte Reeve*, 9 Ves. 588, which shows that the joint creditors are entitled to be paid interest before

the co-partners receive anything.

(b) *Ex parte Terrell*, Buck, 345; *Ex parte King*, 17 Ves. 115; *Ex parte Watson*, Buck, 449, and 4 Madd. 477; and see as to this last case, 2 Gl. & J. 172.

(c) *Re Levey*, 5 New R. 390, L. C.

(d) 1 Rose, 442.

C. *Proof against both the joint and the separate estates.*

First, general rule as to election.

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Rights of joint
and separate
creditors.

With a view to avoid as much as possible any interruption in the statement of the principles according to which the conflicting rights of the creditors of the firm, and the separate creditors of the individual partners, are adjusted, the consideration of the position of those creditors who are both *joint and separate* (i.e., of those, who, in respect of the same debt, have the option of suing either all the partners jointly, or some or one of them separately from the others), has been hitherto postponed.

In order that a creditor may rank as a joint and separate creditor, it is necessary that there should be two distinct rights vested in him at the same time, by virtue of which he is enabled to pursue either of the two remedies above alluded to. The modes in which these rights are acquired and lost have been already investigated, and consequently it is unnecessary to refer to that subject in the present place.

Rule against
double proof.

A person to whom the members of a firm are bound jointly and severally is not, as a rule, allowed in bankruptcy to rank as a creditor both against the joint estate, and also against the separate estates, or any of them. He is, as a rule, compelled to elect whether he will rank as a joint creditor or as a separate creditor (*e*). If he elects to rank as a joint creditor he must, like other joint creditors, go in the first place against the joint estate, and he has no greater rights than they against the separate estates, or any of them; whilst, on the other hand, if he elects to rank as a separate creditor he must, like other separate creditors, confine himself in the first place to the

(*e*) See *Ex parte Bond*, 1 Atk. 98; *Ex parte Banks*, ib. 106; *Ex parte Rowlandson*, 3 P. W. 405; *Ex parte Bevan*, 10 Ves. 106; *Ex parte Hay*, 15 Ves. 4. And see the cases cited hereafter on the subject of double proof. The rule only ap-

plies where the two estates are administered in bankruptcy; see *Ex parte Thornton*, 3 De G. & J. 454, where one of the estates was being administered under a creditor's deed. See, also, *Bonser v. Cox*, 6 Beav. 84.

separate estates, and he has no greater rights than they to the joint estate (*f*). Bk. IV. Chap. 2.
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The reasoning upon which this rule is founded is as follows : Reason of the rule.
If the members of a firm are bound jointly and severally, the creditor may sue them all jointly, or he may sue all or any of them separately, but he cannot do both; and as he cannot do both at law, neither ought he to do what is tantamount to the same thing, in bankruptcy. It is very true that if he sues them all jointly, he can levy execution against the property of the partnership, or against the private property of each member, or against both at once; but so can any joint creditor. So far as analogy goes, therefore, there is no reason why a joint and separate creditor should be allowed to go against both estates at once, whilst a creditor who is merely joint is compelled to go against the joint estate before he can go against the separate estate (*g*). Nor is this all. The grand principle in bankruptcy is, as far as possible, to distribute the bankrupt's estate equally amongst all his creditors, and not to prefer one creditor to another. Now if a joint and separate creditor were to be allowed to prove against both estates at once, he would diminish the separate estate to the prejudice of the joint creditors, and diminish the joint estate to the prejudice of the separate creditors, and gain an advantage over them both (*h*).

Such are the reasons which have induced the Courts to hold that a joint and separate creditor ought not, as a rule, to be allowed to go against both estates at once, but that he should be compelled, like other creditors, to go in the first instance against one estate only. In giving the option to him, the Courts act in analogy to the rule at law, by which a joint and separate creditor can, as he pleases, sue his debtors jointly or separately.

In conformity with the rule thus established, a creditor who is a joint creditor by one instrument, and a separate Examples of the rule.

(*f*) *Ex parte Bevan*, 10 Ves. 106; Eldon followed the rule, but disapproved it; see *Ex parte Bevan*, 9 *Bradley v. Miller*, 1 Rose, 273.

(*g*) See *Ex parte Rowlandson*, 3 Ves. 225, and 10 ib. 109.

P. W. 405; *Ex parte Banks*, 1 Atk. 106; *Ex parte Bond*, ib. 98. Lord (h) See *per* Lord Hardwick in *Ex parte Bond*, 1 Atk. 100.

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creditor by a distinct instrument, is as much compelled to elect as if his joint and separate rights were conferred by one and the same instrument (*i*). And it matters not whether the creditor is a legal or only an equitable creditor; consequently, if a firm has been implicated in a breach of trust, the *cestui que trust* (who thereby acquires in equity a right available against all the partners jointly, as well as against each of them separately) cannot prove against the joint and separate estates at the same time, but must elect against which he will prove, as if he were an ordinary joint and separate creditor (*k*).

Rule pre-supposes a creditor to be a joint as well as a separate creditor.

The doctrine of election, however, only applies where a creditor is, properly speaking, a creditor as well of the firm jointly as of some or one only of its members separately. Where, therefore, a firm has been dissolved, and the continuing partner is to pay all the debts of the firm, then, inasmuch as a creditor of the firm is in no way affected by this arrangement unless he accedes to it, he has not, without having acceded to it, any right, in the event of bankruptcy, to stand as the separate creditor of the continuing partner in respect of the old debt. Under such circumstances he has no right of election, but must rank as a joint creditor (*l*).

Electing against which estate to prove.

The rule as to election would, obviously, be wholly useless unless an election, once deliberately made, were held to be final. On the other hand, it would operate with great harshness if a creditor were held to have finally elected when, in point of fact, he was not in a position to judge which course it would be best for him to adopt. It becomes, therefore, necessary, before leaving this subject, to examine the circumstances which have and those which have not been held to bind the creditor in this respect.

Election when conclusive.

In those cases in which a creditor has been held to have made his election beyond recall, it will be found that he acted not only with a full knowledge of his position, and of the material facts of the case, but also in some manner quite

(*i*) *Ex parte Hill*, 2 Deac. 249. Mac. & G. 795.

Ex parte Vaughan, 3 P. W. 407, is not law.

(*k*) *Ex parte Barnewall*, 6 De G.

(*l*) *Ex parte Freeman*, Buck, 471; *Ex parte Fry*, 1 Gl. & J. 96, and see *ante*, pp. 1154-8.

inconsistent with the character which he has subsequently sought to assume. In *Ex parte Liddel* (m), for example, separate commissions had issued against two partners; distinct accounts of the joint and separate estates were kept in each bankruptcy; a joint and separate creditor proved in both bankruptcies against the joint estate, and obtained a dividend thereout as a joint creditor; he afterwards attempted to rank as a separate creditor, but he was held precluded by his former conduct. So in *Bradley v. Millar* (n), a joint and separate creditor proved under the bankruptcy of one partner, received a dividend, and signed his certificate, and then brought an action against the bankrupt and his solvent co-partner. But it was held that the creditor had elected to rank as a separate creditor, and that he could, therefore, only be permitted to sue the solvent partner separately, and the action against both partners jointly was accordingly restrained (o).

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Ex parte Liddel.

Bradley v.
Millar.

That which is principally calculated to influence the creditor's choice is, of course, the comparative solvency of the joint and of the separate estates; and in order to make his election he must have a reasonable time to inquire into the state of the different funds. He is entitled to defer his election until a dividend is declared, or at least until the assignees are possessed of a fund to make a dividend (p); and in a case where a large number of creditors had a right of election, and the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared of the one than of the other estate (q).

Creditor entitled
to know how
estates stand be-
fore he elects.

A joint and separate creditor ought, it seems, to prove against both estates, but elect which he will be paid out of before he takes a dividend (r); and a creditor who, having a

Election when
not considered
as made.

(m) 2 Rose, 34, and see 1 Ves. & B. 494.

(n) 1 Rose, 273; *Ex parte Borrodailes*, 1 Mont. Part. 129, Appx., was a somewhat similar case. See, too, *Ex parte Solomon*, 1 Gl. & J. 25.

(o) The consequence was, that the solvent partner was enabled to plead a set-off of a debt due to him

alone, which he could not have done had he been sued jointly with the bankrupt.

(p) See Cooke's Bank. Law, 275, ed. 8, *Ex parte Butlin*, there cited; *Ex parte Bond*, 1 Atk. 98; *Ex parte Bentley*, 2 Cox, 218.

(q) *Ex parte Arbouin*, De Gex, 359.

(r) *Ex parte Bentley*, 2 Cox, 218.

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Ex parte Beilby.

Ex parte Masson.

Position of petitioning creditor.

right of election, proves against one estate rather than another, will not be permitted to transfer his proof without showing the grounds which have induced him to change his mind (s). But the mere fact of his having proved against one estate will not, if he has received no dividend from it, preclude him from proving against the other estate, provided he does not seek to disturb any distribution of it which may already have been made. In *Ex parte Beilby* (t), the creditor had proved against the joint estate, but had received nothing from it, and he was allowed to prove against the separate estates, and to take dividends from them, provided no dividend already made should be disturbed. So in *Ex parte Masson* (u), the creditor of a firm had, on the bankruptcy of its surviving partner, proved against his estate, but had received no dividend; and on afterwards discovering that distinct accounts of the joint and separate estates were kept, he was allowed to prove against the joint estate, and to receive dividends thereout. And even if the creditor has not only proved, but received a dividend, still if he can show that he did so in ignorance of material facts, he will be allowed to vary his proof on refunding the dividend he has received, with interest (x).

A joint and separate creditor who petitions for adjudication of bankruptcy against a firm, thereby elects to be treated as a joint creditor; but if, instead of petitioning against the firm, he petitions for a separate adjudication against one of the partners, he may afterwards declare whether he will be treated as a joint or as a separate creditor (y). And if the separate adjudication is afterwards superseded in consequence of an adjudication against a firm, the creditor is restored to his right of election under the bankruptcy of the firm, and is not prejudiced by anything he may have done in the former bankruptcy (z).

(s) *Ex parte Dixon*, 2 M. D. & D. 312.

(t) 3 Ves. 70.

(u) 1 Rose, 159.

(x) *Ex parte Rowlandson*, 3 P. W. 405; *Ex parte Bolton*, 2 Rose, 389; S. C., Buck, 7; *Ex parte Husbands*, 2 Gl. & J. 4, reversing S. C., 5

Madd. 419; *Ex parte Law*, 3 Deac. 541, and Mon. & Ch. 111.

(y) See per Lord Eldon in *Ex parte Bolton*, 2 Rose, 390, 1.

(z) *Ex parte Brown*, 1 Rose, 433, and 1 V. & B. 60; *Ex parte Smith*, 1 Gl. & J. 256.

Secondly, cases in which double proof is allowed.

The rule which excludes a joint and separate creditor from receiving dividends from two estates at once, is subject to an exception where each estate represents a different trade carried on by a different firm. For example, if a firm, A., B., and C., carrying on one business, draws a bill on a firm, A., B., and D., carrying on a distinct business, and the bill is accepted and circulated, a holder of the bill is permitted to rank as a creditor of both firms at the same time, and to obtain dividends from their respective estates accordingly.

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Exception to the
rule against
double proof.

The principle upon which this exception is founded is, that there are distinct trades carried on with distinct capitals, and that the debts of each trade are properly payable out of the assets of the persons who carry it on, whether those debts are collaterally secured or not (*a*). If this principle were logically carried out, double proof would be allowed in all cases where a debt has been contracted by two parties carrying on distinct trades with distinct capitals, and both of whom have become bankrupt. It would be immaterial whether the bankrupt parties were a firm and one of its members, or two firms, one of which included the other, or two firms having only one partner common to them both. It would also be immaterial whether the creditor was or was not aware that one of the trades was in fact carried on by one or more of the persons who, with others, carried on the other trade. Unfortunately, however, the principle in question was occasionally lost sight of, and the consequence was that the cases bearing upon the subject were in an unsatisfactory state, and extremely difficult to reconcile.

Reason of the
exception.

In order, however, to remove the doubts and difficulties which had thus arisen, the following clause was inserted in the Bankruptcy act, 1861 (24 & 25 Vict. c. 134):—

24 & 25 Vict. c.
134.

§ 152. "If any debtor shall, at the time of adjudication, be liable upon any bill of exchange or promissory note in respect of distinct contracts as members of two or more firms carrying on separate and distinct trades, and having distinct estates to

(*a*) See *Ex parte Adam*, 1 V. & B. 496; *Ex parte Bigg*, 2 Rose, 38.

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be wound up in bankruptcy, or as a sole trader and also as the member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts."

Effect of this
enactment.

Upon this section it is to be observed,

1. That it does not alter the general rule as to election, noticed above.

2. That it only applies to liabilities arising on bills and notes. These, however, will probably be found to include all cases actually arising in practice.

3. That as the constitution of the debtor firms is immaterial, notice on the part of the creditor, of their connection with each other, cannot deprive him of his right to double proof.

In the first edition of this work, vol. ii. pp. 1019, *et seq.*, all the cases on this subject were examined at considerable length, and were classified with a view to deduce such rules as the distinctions between them seemed to warrant. The statutory enactment mentioned in the text has, however, rendered it unnecessary to retain any detailed notice of the authorities, and they are therefore merely collected here for reference.

In the following cases double proof was allowed :

Ex parte La Forest, Cooke's B. L. 276, ed. 8.

„ *Benson*, ib. 278.

„ *Walker and Wenslay*, 1 Rose, 441, and 2 V. & B. 254.

„ *Adam*, 2 Rose, 36, and 1 V. & B. 493.

Wickham v. Wickham, 2 K. & J. 478.

In the following cases double proof was not allowed, but the creditor was compelled to elect, although his debtors carried on distinct trades :

Ex parte Liddel, 2 Rose, 34.

„ *Bigg*, ib. 37.

„ *The Bank of England*, ib. 82.

„ *Husbands*, 2 Gl. & J. 4, and 5 Madd. 419.

„ *Moult*, Mont. & Bli. 28, and 2 D. & Ch. 419.

„ *Soper*, 2 Mont. & A. 55, and 4 D. & Ch. 569.

„ *Law*, 3 Deac. 541.

„ *Chevalier*, 1 Mont. & A. 345, affirming *Ex parte Cotesworth*, Mont. & Bli. 92.

„ *Hinton*, De G. 550.

„ *Goldsmid*, 1 De Gex & J. 257, affirmed by the House of Lords, *Goldsmid v. Cazenove*, 8 Ho. Lo. Ca. 785.

The effect of the section alluded to above seems to be to give logical effect to the principle on which double proof is allowed, 1. by abolishing the subtle distinctions introduced by *Ex parte Moult*, and extended by *Ex parte Hinton*, and *Ex parte Goldsmid*; and 2. by removing the doubt as to the materiality of notice on the part of the creditor, of the situation of his debtors with respect to each other.

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Sect. 4.

Thirdly, cases where a secured creditor may split his demand.

The rule as to election throws a joint and separate creditor wholly upon one estate or wholly upon the other; whilst the exceptional rule as to double proof allows him to go for his whole debt against both estates at the same time (*b*). There is, however, a middle course, and one which is open to a joint and separate creditor who has a security for his debt.

Position of joint
and separate
creditors who
have securities.

It has already been seen that under ordinary circumstances a creditor whose debt is secured is not allowed to prove for his debt without giving up his security (*c*); but that this rule does not extend to a creditor who has the security, not only of his bankrupt debtor, but also of somebody else; nor to a creditor of a firm having a separate security from one of the partners, nor to a creditor of one partner having a security from the firm (*d*). This doctrine, coupled with that of election, puts a person who is a joint and separate creditor of one or more bankrupt partners, and who has a security for his debt, in this position:

1. He may prove for his whole debt against the estate to which the security does not belong, and retain and make what he can of his security (*e*): or,

2. He may give up his security, prove for the whole debt due on it against the estate to which the security belongs, and then prove for the residue of his debt against the other estate: thus in fact splitting his demand and proving for part against the joint estate, and for the residue against the separate estates of the partners, or *vice versa*.

(*b*) Of course he cannot obtain more than the whole amount due to him.

(*c*) *Ante*, p. 1162.

(*d*) *Ante*, p. 1163, and see *Ex parte*

Thornton, 5 Jur. N. S. 212.

(*e*) As in *Ex parte Bate*, 3 Deac. 358; *Ex parte Smyth*, ib. 597; *Ex parte Groom*, 2 ib. 265.

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Ex parte Ladbroke.

The first case in which this splitting of debts was allowed was in *Ex parte Ladbroke* (f). There the bankrupt firm was indebted to their bankers to the extent of 27,000*l.* The sum of 18,000*l.*, part of this, was secured by the joint notes of the firm and by a mortgage of the separate property of one of the firm. This mortgage, moreover, extended not only to the 18,000*l.* but to further advances, and contained a joint and several covenant by the bankrupt partners to pay the 18,000*l.* and further advances. The bankers were allowed to prove against the joint estate for the 18,000*l.*, and against the separate estate of the mortgagor for the residue of their debt, after deducting therefrom the sum obtained by a sale of the mortgaged property (g). The report of the judgment is to the effect that the Lord Chancellor thought that the bankers were entitled to pursue the joint liability of the bankrupts on the promissory notes to the extent of those notes, and at the same time to proceed on the several covenants for the residue of the debt.

Ex parte Hill.

Again, in *Ex parte Hill* (h), a partner covenanted to pay 4000*l.* and assigned as a security 3000*l.*, portion of his capital in the firm. A sum of 3000*l.* was then placed in the books of the partnership to the credit of the assignee, and the firm acknowledged themselves debtor to him for the amount. The firm became bankrupt, and although the creditor was not allowed double proof, viz., for 3000*l.* against the joint estate of the firm, and for 4000*l.* against the separate estate of the covenantor, yet he was allowed to prove for the 3000*l.* against the joint estate, and for the remaining 1000*l.* against the separate estate of the covenantor (i).

(f) 2 Gl. & J. 81.

(g) The mortgage security had been sold and a sum of money had been received by the bankers out of the proceeds of the sale, and this sum was deducted from the sum they sought to prove against the separate estate.

(h) 3 M. & Ayr. 175, and 2 Deac. 249.

(i) Some deductions were made, but the above statement is substantially correct with reference to the point for which the case is cited in the text.

SECTION V.—THE BANKRUPT'S ORDER OF DISCHARGE AND ALLOWANCE.

Whether an adjudication is joint or separate, all the creditors, as well joint as separate, are entitled to be heard against the granting of an order of discharge to the bankrupt (*k*). Bk. IV. Chap. 2.
Sect. 5.

An order of discharge operates as a discharge of the bankrupt from all debts proveable under the bankruptcy, whether owing by him alone or by him jointly with others (*l*); with the exception of such debts as are specially excepted by the act (*m*). But the discharge of one of several joint debtors does not discharge his co-debtors (*n*). On the bankruptcy of one partner, his order of discharge discharges him from all demands which his co-partners may have had against him, and which were proveable by them. A leading case on this head is *Wood v. Dodgson* (*o*): there the defendant had covenanted with the plaintiffs, his co-partners, on their retirement from the firm, to indemnify them against the partnership debts; the defendant became bankrupt, and afterwards the plaintiffs were compelled to pay debts of the firm. The defendant obtained his certificate, and this was held to be a bar to an action brought on the covenant by the plaintiffs; for although their demand accrued subsequently to the bankruptcy, it was proveable therein by virtue of the enactment in the bankrupt laws relating to proofs by sureties (*p*). The same point has been decided in other cases (*q*). Effect of bankrupt's order of discharge.

Wood v. Dodgson.

(*k*) 12 & 13 Vict. c. 106, § 140, and see the cases cited in the next note.

(*l*) See 24 & 25 Vict. c. 134, §§ 161 and 162; *Horsey's case*, 3 P. W. 23; *Ex parte Yale*, ib. 24, in the notes; *Twiss v. Massey*, 1 Atk. 67; *Howard v. Poole*, 2 Str. 995; *Wickes v. Strahan*, ib. 1157; and as to the discharge of shareholders, *Thompson v. Harding*, 3 C. B. N. S. 254.

(*m*) 24 & 25 Vict. c. 134, § 161.

(*n*) *Sleech's case*, 1 Mer. 570, 571, and see 24 & 25 Vict. c. 134, § 163.

(*o*) 2 M. & S. 195, and see, *contra*,

Dally v. Wolferston, 3 Dowl. & Ry. 269, in which, however, *Wood v. Dodgson* was not cited. See as to staying a partner's certificate until the partnership accounts have been taken, *Ex parte Hadley*, 1 Gl. & J. 193.

(*p*) The present enactment is 12 & 13 Vict. c. 106, § 173, the old one was 49 Geo. 3, c. 121, § 8.

(*q*) See *Ex parte Carpenter*, Mont. & MacAr. 1; *Aflalo v. Fourdrinier*, 6 Bing. 306; *Wright v. Hunter*, 1 East, 20.

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Sect. 5.

What calls are
not barred.

An order of discharge, however, is no bar to a debt not proveable under the bankruptcy (*r*), and consequently not to an action for calls made on a bankrupt since his bankruptcy (*s*). But calls made under the winding-up provisions of the Companies act, 1862, being proveable even when made subsequently to adjudication, it follows that an order of discharge is a defence to such calls (*t*). But it is apprehended that if a bankrupt obtains his order of discharge and continues a shareholder, his order of discharge will not exonerate him from subsequent calls (*u*).

Joint orders of
discharge.

An order of discharge granted to two or more persons protects each and all, so that the death of one does not affect the other (*x*).

Where there is a joint adjudication against several partners, and some of them appeal from it, the Court will not on that account delay granting orders of discharge to the others (*y*).

Refusal of orders
of discharge.

For the law and practice relating to the granting and refusal of orders of discharge, to the suspension of such orders, and to the granting of them with conditions, the reader is referred to treatises on bankruptcy. Such matters illustrate no principles of the law of partnership, and are foreign, therefore, to the objects of this work (*z*).

(*r*) See, as to a claim by a surety for indemnity, *Rice v. Gordon*, 11 Beav. 265; and as to bonds payable on a contingency, *Hinton v. Acraman*, 2 C. B. 367.

(*s*) *Ante*, p. 1160. As to the consequence of omitting the liability to calls from the schedule, see *Parbury's case*, 3 De G. F. & J. 80.

(*t*) *Ante*, p. 1161.

(*u*) See *South Staffordshire Rail. Co. v. Burnside*, 5 Ex. 129, but see § 75 of the Companies' act, 1862, *ante*, p. 1162.

(*x*) See, as to advertising a joint certificate as a separate one, *Ex parte Carter*, 1 M. & A. 115; *Ex parte Cossart*, 1 Gl. & J. 248; *Ex parte Currie*, 10 Ves. 51.

(*y*) *Ex parte Braggiotti*, 2 De G. Mac. & G. 964.

(*z*) See 24 & 25 Vict. c. 134, §§ 157, *et seq.* As to gambling in the shares and stock of companies, see *Ex parte Wade*, 8 De G. Mac. & G. 241; *Ex parte Mellor*, *ib.* 248; *Ex parte Ryder*, 1 De G. & J. 317; *Ex parte Turner*, 3 *ib.* 46; *Ex parte Copeland*, 2 De G. Mac. & G. 914; *Ex parte Matheson*, 1 *ib.* 448. An order of discharge which has been obtained may nevertheless be void, see *Wagner v. Imbrie*, 6 Ex. 882; *Weeson v. Allcard*, 7 *ib.* 753; *Courtivron v. Meunier*, 6 *ib.* 74. As to suspending orders of discharge and granting them with conditions, see *Re Mew and Thorne*, 10 W. R. 790, L. C. *Ex parte Hammond*, 6 De G. Mac. & G. 699; *Ex parte Anderton*, 1 De G. & J. 298. As to refusing a certificate where a trader

The same observation applies to the law and practice relating to the allowance made to a bankrupt out of his estate for the support of himself and family (*a*). Upon this subject the following rules alone require notice here :

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Sect. 5.

Allowances to
bankrupt
partners.

1. Unless a sufficient dividend is paid both to the joint and to the separate creditors of a bankrupt partner, he will not be entitled to any allowance (*b*).

2. If both classes of creditors are paid a sufficient dividend, each partner will be entitled to an allowance, although he may have contributed little or nothing to the payment of the joint creditors (*c*).

3. When one partner only is bankrupt, and he has paid his separate creditors in full, he is not entitled to an allowance out of the joint estate to the prejudice of the joint creditors (*d*).

4. A bankrupt partner is not entitled to a double allowance, one in respect of the joint and the other in respect of his separate estate. He is entitled to only one allowance, calculated on the amount of his separate estate, and of his share of the joint estate (*e*).

5. Where a separate adjudication is annulled in favour of a joint adjudication, the bankrupt's right to an allowance is not prejudiced (*f*).

6. An allowance may be granted to one partner and withheld from another (*g*).

has continued to struggle on after it was evident that he ought to stop, see *Ex parte Rufford*, 2 De G. Mac. & G. 234. If one of several partners to whom the bankrupt is indebted signs his certificate, that is equivalent to a signature by the firm, *Ex parte Hall*, 1 Rose, 2. In *Ex parte Dance*, 1 De G. F. & J. 286, the misconduct of one partner was held not to render it necessary to refuse a certificate to his co-partner. In *Ex parte Nicholson*, 1 De G. F. & J. 270, a partner, who had falsified the books of the firm to conceal the true state of the partnership accounts from his co-

partner, was refused his certificate.

(*a*) See 12 & 13 Vict. c. 106, §§ 194, *et seq.*

(*b*) *Ex parte Goodall*, 2 Gl. & J. 281; *Ex parte Farlow*, 1 Rose, 421; *Ex parte Powell*, 1 Madd. 68.

(*c*) *Ex parte Morris*, Mon. 505; *Ex parte Gibbs*, 105.

(*d*) *Ex parte Holmes*, 3 V. & B. 137.

(*e*) *Ex parte Lomas*, 1 Mon. & A. 525. See, too, *Ex parte Bate*, 1 Bro. C. C. 453; *Ex parte Minchin*, Mont. & MacAr. 135.

(*f*) *Ex parte Llewellyn* 3 M. D. & D. 573.

(*g*) 12 & 13 Vict. c. 106, § 196.

SECTION VI.—ARRANGEMENTS WITH CREDITORS.

Bk. IV. Chap. 2.
Sect. 6.

By the Bankruptcy act, 1861, debtors, whether partners or not, are enabled without becoming bankrupt to make arrangements with their creditors respecting their debts and liabilities, and their release therefrom, and for the distribution, inspection, management, and winding up of their estates; and the arrangements so made are binding not only on assenting but also on all other creditors provided certain conditions which are specified in the act are duly observed (*h*).

It would be foreign to the objects of the present treatise to notice the very numerous cases which have been decided on the subject now under consideration, and it is proposed here merely to draw the reader's attention to those fundamental rules which relate—1. to the requisites of deeds intended to bind non-assenting creditors, and, 2. to the effect of such deeds (*i*).

1. *Requisites to the validity of deeds of arrangement.*

The conditions on which a deed or other instrument executed by a non-bankrupt debtor (*k*) for the benefit of his creditors may bind not only those creditors who assent to it, but those who do not, are mainly comprised in §§ 192 and 200 of the Bankruptcy act, 1861, which are as follows :

As to trust deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor.

Bankruptcy act,
1861, § 192.

§ 192.—“ Every deed or instrument made or entered into between a debtor and his creditors or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom,

(*h*) 24 & 25 Vict. c. 134, §§ 192, *et seq.*

(*i*) For full information on all matters relating to creditors' deeds, see Messrs. De Gex and Smith's Treatise on Arrangements between Debtors and Creditors; and Messrs. Griffith and Holmes' Treatise on

the Law and Practice in Bankruptcy, vol. ii. pp. 1002, *et seq.* The leading cases only are referred to in the ensuing notes.

(*k*) Arrangements by bankrupts are not here alluded to. See as to them, 24 & 25 Vict c. 134, §§ 110 and 185—191.

or the distribution, inspection, management, and winding up of his estate, or any of such matters shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed; that is to say,

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- " 1. A majority in number representing three-fourths in value of the creditors of such debtors whose debts shall respectively amount to 10*l*. and upwards shall before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument.
- " 2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same.
- " 3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor (*l*).
- " 4. Within 28 days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar for the purpose of being registered (*m*).
- " 5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees that a majority in number, representing three-fourths in value of the creditors of the debtor whose debts amount to 10*l*. or upwards have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed.
- " 6. Such deed or instrument shall before registration bear such ordinary and ad valorem stamp duties as are hereinafter provided.
- " 7. Immediately on the execution thereof by the debtor possession of all the property comprised therein, of which the debtor can give or order possession shall be given to the trustees.

" § 200.—If a debtor cannot obtain the assent of a majority in number representing three-fourths in value of his creditors, by reason of his being unable to ascertain by whom bills of exchange, promissory notes, or other negotiable securities accepted, drawn, made, or endorsed by him are holden, or by reason of the absence of creditors in a foreign country or other similar circumstances, it shall be sufficient if he obtain the consent of a majority in number representing three-fourths in value of all his other creditors to such deed or instalment as aforesaid; provided that notice shall have been inserted by or on behalf of the debtor in one or more newspapers published in the county or place at which he shall have carried on business immediately prior to the date of such deed or instrument, requiring his creditors to signify their assent to or dissent from such deed or instrument by notice in writing addressed to the trustee or trustees thereof within fourteen days from the insertion of such notice, and that the affidavit or certificate of the trustee or trustees shall

§ 200. Provision in case debtor cannot obtain assent of requisite majority of creditors.

(*l*) See as to this, *Re Fulcher*, L. R. 1 Ch. App. 519.

(*m*) This time cannot be enlarged, *Re Power*, L. R. 1 Ch. App. 153.

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state the circumstances of the case, and the same shall be allowed by the Court; and provided the deed or instrument be in such form as is expressed in Schedule (D.) to this act annexed, which shall vest all the estate and effects of the debtor in the trustees of such deed, and provided that all such other conditions as are hereinbefore required be duly complied with" (n).

Other requisites.

These sections have been printed at length because of their great importance. The other requisites, to which it is here only necessary to allude, are, that the deed must be stamped not only with the ordinary amount of stamp duty, but also with a duty of 5s. upon every 100*l.* or fraction of 100*l.* of the value of the property comprised in, or to be collected or distributed under it (o). The date, names, and descriptions of the parties to the deed, (not including the creditors,) and a short statement of the nature and effect of the deed, is to be made by the chief registrar in bankruptcy in a book within forty-eight hours after the deed has been left with him, and a copy of the entry must be published in the "London Gazette" within four days after the entry (p).

Cessio bonorum.

The reader will observe that where a debtor is driven to rely on § 200 by reason of his inability to obtain the assent of such a majority of his creditors as is required by § 192, it is necessary that he shall transfer his whole property to trustees for the benefit of his creditors. But it is now settled that to render a deed valid under § 192, no *cessio bonorum* is requisite; the deed need not assign anything whatever (q).

Deed must be for the benefit of all the creditors.

In order, however, that a deed may bind non-assenting creditors under § 192, it must be for the benefit of all the debtor's creditors without exception: and any clause excluding

(n) See as to this section, *Ex parte Mendel*, 1 De G. J. & S. 330; *Ex parte Dobson*, 12 W. R. 1094. Schedule D. is as follows:—

This deed, made the _____ day of _____, between A. B. [*the debtor*], and C. D. and E. F. [*the trustees*], on behalf and with the assent of the undersigned creditors of A. B., Witnesseth that A. B. hereby conveys all his estate and effects to C. D. and E. F. absolutely, to be applied and adminis-

tered for the benefit of the creditors of A. B. in like manner as if A. B. had been at the date hereof duly adjudged bankrupt. In witness, &c.

Schedule of Creditors.

(o) § 195.

(p) § 193.

(q) *Clapham v. Atkinson*, 4 B. & Sm. 722; *Ex parte Rawlings*, 1 De G. J. & Sm. 225; *Ex parte Morgan*, ib. 288, overruling *Walter v. Adcock*, 7 H. & N. 541.

those who do not execute the deed (*r*), or who do not come in under it within a given time (*s*), invalidates the deed as against all non-assenting creditors.

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Further, the deed must be for the benefit of all creditors equally, and not give assenting creditors any advantage or preference over the others. Such inequalities, however, as are unavoidable in carrying the deed into effect, will not vitiate it if there is no inequality in principle (*t*); and the better opinion seems to be, that if there is no more inequality amongst the creditors than there would be under an adjudication, the deed will be valid (*u*).

Equal benefit
essential.

The deed, moreover, must not be unreasonable in any of its provisions. The test of reasonableness as distinguished from equality is, however, by no means well defined; and assuming all creditors to be put on a par, there is a growing tendency on the part of the Courts to uphold as reasonable that to which the requisite majority of creditors has assented (*x*).

Deed must not
be unreasonable.

(*r*) *Martin v. Gribble*, 3 H. & C. 631; *Buvelot v. Mills*, L. R. 1 Q. B. 104; *Ilderton v. Castrique*, 14 C. B. N. S. 99, affirmed 16 ib. 142; *Ilderton v. Jewell*, 14 ib. 665, affirmed 16 ib. 142.

(*s*) *Ex parte Morgan*, 1 De G. J. & Sm. 288; *Berridge v. Abbott*, 13 C. B. N. S. 507; *Copeman v. Hart*, 14 ib. 91; *Dewhurst v. Kershaw*, 1 H. & C. 726. Compare *Re Tresidder*, L. R. 1 Ch. App. 21.

(*t*) *Blumberg v. Rose*, L. R. 1 Ex. 232. See, also, *Hidson v. Barclay*, 3 H. & C. 361.

(*u*) See on the question of equality, *Strick v. De Mattos*, 3 H. & C. 22, affirmed, L. R. 1 Ex. 91; *Woods v. De Mattos*, 3 H. & C. 987; *Hidson v. Barclay*, ib. 361, reversing S. C., ib. 9; *Tetley v. Wanless*, L. R. 2 Ex. 21; *Blumberg v. Rose*, L. R. 1 Ex. 232; *Re Tresidder*, L. R. 1 Ch. App. 21; *Ex parte Spyer*, 1 De G. J. & S. 318; *Clapham v. Atkinson*, 4 B. & S. 722; *Wells v. Hacon*, 5 ib. 196; *Reeves v. Watts*, L. R. 1

Q. B. 412, in all of which the deeds were upheld: and compare *Thompson v. Knight*, L. R. 2 Ex. 42; *Ex parte Cockburn*, 33 J. L. Bank. 17, and 10 Jur. N. S. 573; *Hickmott v. Simmonds*, L. R. 2 Eq. 462; *Benham v. Broadhurst*, 3 H. & C. 472; *Kilby v. Wright*, 18 C. B. N. S. 272; *Chesterfield Colliery Co. v. Hawkins*, 3 H. & C. 677; *Gurrin v. Kopera*, ib. 694, in all of which they were held bad. See, also, the next note, and *Dingwall v. Edwards*, 4 B. & S. 738, where the Court was divided.

(*x*) See as to reasonableness as distinguished from equality, *Coles v. Turner*, L. R. 1 C. P. 373; *Greenberg v. Ward*, ib. 585; *Bond v. Weston*, L. R. 1 Q. B. 169; *Johnson v. Barratt*, L. R. 1 Ex. 65; *Keyes v. Elkins*, 5 B. & Sm. 240; *Haselgrove v. House*, L. R. 1 Q. B. 101; *Walker v. Nevill*, 3 H. & C. 403; *Hidson v. Barclay*, 3 H. & C. 361, reversing S. C., ib. 9; *Dewhurst v. Jones*, 3 H. & C. 60; *Scott v.*

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Where debtor is
a partner.

Mode of reckon-
ing majority of
assents.

Where there are
two classes of
creditors.

Where the debtor is a partner the deed must be for the benefit as well of the joint as of the separate creditors. It is obvious that a deed for the benefit of one class only, can be of no avail against the other class (*y*); and from the principle that to be valid under § 192, a deed must be for the benefit of all creditors, a deed which provides only for one class cannot be binding on non-assenting persons even within that class. It has, however, been held, that a deed of composition and inspectorship is not invalid against non-assenting creditors, because there are joint and separate creditors, and joint and separate estates, and the deed places both classes of creditors on the same footing as regards the composition payable to them (*z*).

In computing the creditors whose assents are requisite to render a deed binding under § 192, all persons having claims against the debtor which would have been proveable against his estate if he had been adjudicated bankrupt, must be counted (*a*); and, after some difference of opinion (*b*), it is now settled that secured as well as unsecured creditors are to be reckoned, and that the values of their securities are not to be deducted (*c*).

Whether when the debtor is a partner it is necessary for him to obtain a majority in number representing three-fourths in value of his separate creditors taken as one class, and a like majority of his joint creditors taken as another class, or

Berry, ib. 966, and the cases cited *infra*, respecting releases, in all of which the deeds were upheld. Compare with them, *Leigh v. Pendlebury*, 15 C. B. N. S. 815; *Woods v. Foote*, 1 H. & C. 841; *Dell v. King*, 2 H. & C. 84; *Boulnois v. Mann*, 4 H. & C. 9, and L. R. 1 Ex. 28; *Balden v. Pell*, 5 B. & Sm. 213; *Latham v. Lafone*, L. R. 2 Ex. 115; *Giddings v. Penning*, L. R. 1 Ex. 325; *Hickmott v. Simmonds*, L. R. 2 Eq. 462; *Inglebach v. Nichols*, 14 C. B. N. S. 85; *Brompton, &c., v. Waterworks Co.* *Jennings*, 19 C. B. N. S. 149, in all of which the deeds were held bad. *Leigh v. Pendlebury* was overruled

by *Coles v. Turner*.

(*y*) *European Central Rail. Co. v. Westall*, L. R. 1 Q. B. 167.

(*z*) *Walker v. Nevill*, 3 H. & C. 403. The deed contained no assignment to the trustees. Compare *Ex parte Cockburn*, 10 Jur. N. S. 573, and 33 J. L. Bank. 17.

(*a*) *Woods v. De Mattos*, 3 H. & C. 987.

(*b*) Compare *Ex parte Godden*, 1 De G. J. & Sm. 260; and *Ex parte Morgan*, ib. 288.

(*c*) *Whittaker v. Lowe*, L. R. 1 Ex. 74; *Re Stark*, L. R. 1 Ch. App. 150; *Turquand v. Moss*, 17 C. B. N. S. 15; *King v. Randall*, 14 ib. 721.

whether it is sufficient to obtain the requisite majority without distinguishing the two classes, are questions which have been discussed but not determined (*d*). It has, however, been decided, that where the requisite majority of all the creditors without any distinction of class has been obtained, a deed ought to be considered valid until it is proved that the requisite majority of each class has not been obtained (*e*), and that there is joint estate for the joint creditors, and separate estate for the separate creditors (*f*). What the consequence, however, of evidence to the above effect would be, is still unsettled. Judging from the analogous decisions under the older statutes, it would seem that the joint creditors ought to reckon with the separate creditors of each partner; and that if there is the requisite majority of the joint creditors, and a like majority of all the creditors, the statute is sufficiently complied with; although if the separate creditors were taken as a distinct class there would not be a sufficient majority of that class (*g*). It is, however, to be observed, that unless the requisite majority of each class is necessary, either class may, under certain circumstances be overwhelmed by the other. So long as this is possible, there is some meaning in the doctrine that deeds to be valid under § 192 must not be unreasonable, as distinguished from unequal (*h*).

It has already been seen that, as a general rule, one partner has no implied authority to bind the partnership by a deed (*i*); but a mere release is an exception to this rule (*k*), and there is authority for saying that a creditors' deed containing a release and executed by one partner on behalf of himself and co-partners, precludes them from suing the debtor (*l*); but a creditors' deed may contain clauses to which one partner would

Assent by one
partner on behalf
of a firm.

(*d*) *Ex parte Cockburn*, 10 Jur. N. S. 573, and 33 J. L. Bank. 17; *Walker v. Nevill*, 3 H. & C. 403; *Ex parte Oldfield*, 11 L. T. N. S. 756.

(*e*) *Walker v. Nevill*, 3 H. & C. 403.

(*f*) *Ex parte Cockburn*, and *Ex parte Oldfield*, *ubi sup.*

(*g*) See *Ex parte Heath*, 4 De G. & Sm. 593; *Calvert v. Calvert*, 3 De G. & J. 95. Compare *Re Par-*

rott, 8 Ir. Ch. 391.

(*h*) *Ante*, p. 1203.

(*i*) *Ante*, p. 282.

(*k*) *Ante*, p. 299.

(*l*) See *Teede v. Johnson*, 11 Ex. 840; *Morans v. Armstrong*, Armstr. Mac. and Ogle (Irish), 25; and as to the power of the manager of a bank to bind it in such matters, see *Dudgeon v. O'Connell*, 12 Ir. Eq. 566.

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have no implied authority to assent on behalf of his co-partners; and even if he and they were bound by the release, it would not follow that they could be sued on covenants for indemnity and the like which might be contained in the deed.

2. *Effect of creditors' deeds.*

Unregistered
deeds.

No deed or instrument by which a debtor (not being a bankrupt) conveys or agrees to convey his property, or the principal part of it, for the benefit of his creditors, or makes any arrangement with them, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or his release and discharge from his liabilities, can be given in evidence at all unless it is registered within twenty-eight days after execution by him, or within such further time as the Court of Bankruptcy in London may allow (*m*). This rule applies not only to deeds intended to bind non-assenting creditors under § 192, but to all creditors' deeds whatsoever (*n*). It is doubtful whether a deed which ought to be registered can, if unregistered, be given in evidence, even as an act of bankruptcy (*o*).

Registered deed.

The effect of a creditor's deed which is registered depends upon whether it is valid and binding on non-assenting creditors, or whether it is not. A deed which is not binding on them under § 192 may nevertheless (if registered) pass the debtor's property (*p*) and bind those persons who have executed it or assented to it (*q*), and of course be an act of bankruptcy if too long a time is not allowed to elapse between the execution of the deed and a petition for adjudication (*r*).

Effect of registered deed.

The registration of such a deed as is contemplated by § 192

(*m*) 24 & 25 Vict. c. 134, § 194. The court of bankruptcy can enlarge the time for registration under this section; see the section, and *Wishart v. Fowler*, 4 B. & Sm. 674; but a deed registered under § 194, after the twenty-eight days does not render the deed valid under § 192.

(*n*) *Ex parte Morgan*, 1 De G. J. & Sm. 288; *Hodgson v. Wightman*, 1 H. & C. 810.

(*o*) Compare *Ex parte Potter*, 13 W. R. 189, with *Ex parte Wensley*, 1 De G. J. & Sm. 273.

(*p*) *Symonds v. George*, 3 H. & C. 68 & 996; *Pickstock v. Lister*, 3 M. & S. 371.

(*q*) As to assenting as distinguished from executing, De Gex and Smith, on Arrangements, &c., p. 38.

(*r*) *Ante*, 1079.

gives the Court of Bankruptcy jurisdiction over all the parties to it in all matters relating to the estate of the debtor. The enactment on this subject is as follows:—

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“§ 197.—From and after the registration of every such deed or instrument, in manner aforesaid, the debtor and creditor, and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act in the same or like manner as if the debtor had been adjudged a bankrupt and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy; and except where the deed shall expressly provide otherwise, the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorised to do if the debtor in such had been adjudged bankrupt and his estate were administered in bankruptcy” (s).

Jurisdiction of the court and rights and liabilities of the parties after registration of deed.

The general effect of this section is to render the execution and registration of a deed which is binding on non-assenting creditors under § 192 equivalent to an adjudication of bankruptcy (t): and it has been held that the trustees have the same power to impeach prior fraudulent conveyances as assignees would have had if there had been an adjudication on the debtor's own petition (u). Whether the trustees can

(s) This section only applies to deeds which are binding under § 192, see *Pearson v. Pearson*, L. R. 1 Ex. 308; *Ex parte Morgan*, 1 De G. J. & Sm. 288. See, as to the power of summoning witnesses, *Ex parte Alexander*, 1 De. G. J. & Sm. 311. As to examining the trustees, *Ex parte Laurence*, 1 De G. J. & S. 307. A non-assenting creditor is entitled to examine the debtor, *Ex parte Brooks*, 33 L. J. Bank. 41. As to examining the debtor in order to prove the invalidity of the deed, see

Re Fachiri, 2 Weekly N. 49. Deeds which are not valid under § 192, and not therefore within § 197, may yet be valid at common law. See *Symons v. George*, 3 H. & C. 68 and 996.

(t) See *Ex parte Spyer*, 1 De G. J. & Sm. 318.

(u) See on this, *Topping v. Key-sell*, 16 C. B. N. S. 258, where the deed was executed after a petition for adjudication. *Wood v. Dunn*, L. R. 2 Q. B. 73, reversing S. C., ib. 1 Q. B. 77. See, further, *Stevenson v. Newnham*, 13 C. B. 285.

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under this section, obtain an order for the sale of goods and chattels in the order and disposition of the debtor with the consent of the true owner at the time of the registration of the deed, has not yet been decided; but it would seem that they can if the deed amounts to a *cessio bonorum* (x). The rules which prevail in bankruptcy respecting the proof of debts by secured creditors (y), and the rules respecting double proof and election which are observed when administering the estates of bankrupt partners (z) will, it is apprehended, apply to the administration of estates under deeds governed by §§ 192 and 197, except where the application of those rules is expressly excluded. But it seems that a deed is not unreasonable, and therefore invalid, which provides for a distribution of a debtor's estate upon different principles (a). The doctrines relating to mutual credit and set-off (b), and to *bonâ fide* transactions with bankrupts without notice of an act of bankruptcy (c), have been held to apply to these deeds.

Protection to
the debtor.

The most important effect, however, of a deed which is valid under § 192 is that which it derives from § 198, which is as follows:—

§ 198.

“§ 198.—After the notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the Court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the Court shall be available to the debtor for all purposes as a protection in bankruptcy” (d).

Effect of cer-
tificate.

The registrar's certificate of registration is *primâ facie* evidence that the debtor is entitled to the protection which a valid deed affords him (e). Consequently, non-assenting creditors are entitled to apply to the Court of Bankruptcy to cancel

(x) See De Gex and Smith on Arrangements between Debtors and Creditors, p. 85.

(y) *Ante*, p. 1162.

(z) *Ante*, pp. 1188, *et seq.*

(a) See *Walker v. Nevill*, 3 H. & C. 403.

(b) *Stanger v. Miller*, L. R. 1 Ex. 58.

(c) *Wood v. Dunn*, L. R. 2 Q. B. 73, reversing S. C., 1 ib. 77.

(d) See § 199, as to staying proceedings upon and dismissing petitions for adjudication of bankruptcy.

(e) *Lloyd v. Harrison*, L. R. 1 Q. B. 502, affirming S. C., 6 B. & Sm. 36.

the certificate, or to allow execution to issue notwithstanding the deed and certificate, if the deed is in fact invalid; but such an application will not be acceded to if the applicant has lain by and allowed the deed to be acted upon for any considerable length of time, *e. g.*, eleven months (*f*). Moreover, the certificate is not conclusive evidence; nor is it necessary to have the certificate cancelled in order to impeach the deed (*g*).

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Whether a deed is pleadable in bar to an action depends upon circumstances. If the deed contains a release, whether expressed formally or in the shape of a recital (*h*) is immaterial, the deed may be pleaded in bar to an action brought against the debtor by any creditor on whom the deed is binding (*i*); and always therefore to an action by a creditor who has executed the deed (*k*). But if the deed contains no release, as is the case with the deed in schedule D to § 200 (*l*), it cannot be pleaded as a release even against a creditor who has executed it (*m*). At the same time it has been held that a composition deed containing no release but binding under § 192, may be pleaded in bar to an action by a creditor to whom the composition has been tendered before action brought (*n*). The circumstances under which a covenant not to sue amounts to a release have been alluded to in an earlier page (*o*).

Deed when a
release.

(*f*) *Ex parte Banfield*, L. R. 1 Ch. App. 154.

(*g*) See *Ex parte Page*, 1 De G. J. & S. 283. This settled the doubt expressed by L. J. Turner in *Ex parte Rawlings*, 1 De G. J. & S. 225, and *Ex parte Godden*, *ib.* 260. As to filing interrogatories in an action, with a view to impeach the deed, see *Bayley v. Griffiths*, 1 H. & C. 429.

(*h*) *Lay v. Mottram*, 19 C. B. N. S. 479; *Gresty v. Gibson*, L. R. 1 Ex. 112; *Brooks v. Jennings*, L. R. 1 C. P. 476.

(*i*) See the last note, and *Corner v. Sweet*, L. R. 1 C. P. 456; *Reeves v. Watts*, L. R. 1 Q. B. 412; *Oppenheimer v. Grieves*, 7 H. & N. 533, shows that the deed is not bar to an action commenced before the

Bankruptcy act, 1861, came into operation.

(*k*) *Kitchin v. Hawkins*, L. R. 2 C. P. 22. Non-assenting creditors are of course not affected by a release contained in an invalid deed, *Dell v. King*, 2 H. & C. 84.

(*l*) *Ante*, p. 1202, note (*n*).

(*m*) *Eyre v. Archer*, 16 C. B. N. S. 638; *Tabor v. Edwards*, 4 *ib.* 1; *Legge v. Cheeseborough*, 5 *ib.* 741; *Ray v. Jones*, 13 W. R. 1018; *Clarke v. Williams*, 3 H. & C. 508, 1001; *Ipstones Park Iron Ore Co. v. Pat-
tinson*, 2 H. & C. 828.

(*n*) *Garrod v. Simpson*, 3 H. & C. 394. The plea was in substance a plea of accord, and tender in lieu of satisfaction.

(*o*) *Ante*, p. 298.

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Protection af-
forded by valid
deed.

The court to
which applica-
tion should be
made for protec-
tion.

The protection afforded by a deed which is valid under § 192, only extends to debts proveable under it (*p*); but as regards all debts which are proveable under it, such a deed entitles the debtor to be discharged from custody, even if arrested before the execution of the deed (*q*); and entitles him to have the sheriff withdrawn if he has seized the debtor's property (*r*). A debtor may, however, preclude himself by his own laches from obtaining the protection to which he would otherwise have been entitled (*s*).

The court to which a debtor should apply for protection is the Court of Bankruptcy (*t*): but it seems that if he applies to the court out of which execution has issued, that court will stay execution (*u*).

(*p*) *Hoggarth v. Taylor*, L. R. 2 Ex. 105.

(*q*) *Marks v. Hall*, L. R. 2 Q. B. 31; *Baersalman v. Langlands*, 3 H. & C. 433.

(*r*) *Rogers v. Roberts*, L. R. 2 Ex. 35.

(*s*) See *Whitmore v. Wakerley*, 3 H. & C. 538, where he let judgment go by default, before applying to the court. But compare *Hartley v. Mare*, 19 C. B. N. S. 85.

(*t*) *Skilton v. Symonds*, 18 C. B. N. S. 818, and see the act.

(*u*) As in *Stone v. Jellicoe*, 3 H. & C. 263; *Baersalman v. Langlands*, 3 H. & C. 433; *Marks v. Hall*, L. R. 2 Q. B. 31; *Rogers v. Roberts*, L. R. 2 Ex. 35; *Hartley v. Mare*, 19 C. B. N. S. 85, where, however, there was an interpleader. See further on this point, *Ex parte Godden*, 1 De G. J. & Sm. 260; *Ex parte Castleton*, 31 L. J. Bank. 71.

CHAPTER III.

OF THE WINDING UP OF COMPANIES.

INTRODUCTORY.

IN consequence of the great difficulty experienced in winding up the affairs of partnerships consisting of numerous members holding transferable shares, various statutes commonly called the Winding-up acts have from time to time been passed.

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Winding-up
acts.

The first of these acts was 7 & 8 Vict. c. 111, which had three principal objects; viz., 1. to give courts of bankruptcy jurisdiction over incorporated, trading or commercial companies, and to enable those courts to apply the assets of such companies in payment of their debts; 2. to enable the affairs of a company adjudicated bankrupt to be wound up in Chancery, so that if its assets were not sufficient to pay its creditors in full, the members might be compelled to raise what might be necessary for that purpose by a contribution amongst themselves, and so that the rights of the members *inter se* might also be finally adjusted; and 3. to facilitate the discovery of any abuses which might have attended the formation or management of the company, and the causes of its failure, and to authorise prosecutions against its delinquent directors or officers. This statute, after being considerably modified by 11 & 12 Vict. c. 45, and 20 & 21 Vict. c. 78, was finally repealed by the Companies act, 1862 (see §§ 205—207).

7 & 8 Vict. c.
111.

The next statute passed for winding up companies was 11 & 12 Vict. c. 45, which was shortly afterwards amended by 12 & 13 Vict. c. 108. These acts were also repealed by the Companies act, 1862; but they have formed the basis of the law of winding up, and a few observations upon them will not be out of place.

Winding-up acts
of 1848 and
1849.

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Object of the
Winding-up acts
of 1848 and
1849.

The main object of the Winding-up acts of 1848 and 1849, was to enable companies to be dissolved, and wound up more expeditiously than was possible by means of an ordinary suit in Chancery, and more completely than was possible under the act of 7 & 8 Vict. c. 111. This latter act was passed principally for the purpose of enabling creditors to obtain payment of their debts from insolvent companies; the acts of 1848 and 1849, on the other hand, were passed principally for the purpose of supplying shareholders with a means by which they might relieve themselves from their liabilities to creditors, by having the assets of the company properly got in, and applied in payment of its debts, and by having any deficiency made good by contribution amongst themselves. Under these acts an order for the winding up of a company was obtained by petition to the Court of Chancery, and was carried into effect by an officer called the official manager, acting under the direction of one of the equity judges (or of a master in Chancery) whose duty it was to determine what debts were payable by the company, who were the persons to pay them, what calls, if any, were to be made on such persons for their payment, how the conflicting claims of such persons *inter se* were to be adjusted, how the costs of the winding up were to be provided for, and lastly, how the surplus assets, if any, were to be divided.

Defects of the
acts of 1848
and 1849.

The object of the acts in question was, undoubtedly, laudable; and, before their working had been practically tested, it might reasonably have been supposed that they would have proved more satisfactory than was the case. Unfortunately, however, experience sadly warrants the opinion of a late eminent judge, who is reported on one occasion to have characterised the act of 1848 as an enactment that had, he believed, done good in some few instances, but had done the reverse in so many more, and so extensively, that it seemed to be one of those curative measures not by any means confined to a single branch of science, where the remedy is worse than the disease (*a*). These acts had several great defects.

The first defect was that the creditors were not restrained

(*a*) 3 De G. Mac. & G. 148; and see 3 De G. & Sm. 239.

from pursuing their legal remedies against the shareholders individually; so that, notwithstanding a winding-up order, any shareholder might be, and frequently was, singled out and utterly ruined by a creditor of the company, although if the creditor could have been compelled to wait, he would have received his principal and interest in full from funds provided by a proper contribution from all the members of the company (b). This defect was in a great measure removed by 21 & 22 Vict. c. 78, under which the creditors could be required to choose a representative (*the creditors' representative*), and be compelled to wait for payment out of the funds raised by contribution.

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1. Creditor's right to sue at law.

21 & 22 Vict. c. 78.

A second defect was that the creditors of a company were not entitled to obtain an order for winding it up. They consequently either sued the shareholders individually, or proceeded against the company in bankruptcy, under 7 & 8 Vict. c. 111. By suing the shareholders individually, the latter were liable to be, and frequently were, utterly ruined; when, under a better machinery, such a result might have been wholly avoided without detriment to the creditors. By proceeding against the company in bankruptcy under 7 & 8 Vict. c. 111, when the same company was being or might be wound up in Chancery under the acts of 1848 and 1849, the Courts of Chancery and of Bankruptcy were brought into collision, and questions of great difficulty as to the rights of their respective officers arose (c).

2. Creditors not entitled to obtain a winding-up order.

A third defect was that no provision was made by which a company's affairs could be wound up by the shareholders themselves without the intervention of the Court of Chancery.

3. No voluntary winding up.

A fourth defect, which was rendered worse rather than better by the institution of a creditors' representative, was the excessive cost of winding-up proceedings.

4. Expense.

All these defects, except the last, were removed by the Joint-stock companies acts 1856, 1857, and 1858. Under these acts companies might be wound up at the instance of

Acts of 1856 to 1858.

(b) See *infra*, § 6, pp. 1252 *et seq.*(c) See on this subject, *Aitcheson v. Lee*, 3 Drew. 637, and on appeal, 3 Jur. N. S. 1111; *London and**Eastern Banking Corporation*, 2 De G. & J. 484; *Mitre Assurance Association*, 29 Beav. 1; *Ex parte Collingridge*, 14 Jur. 1129.

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creditors as well as of contributories; the creditors could not sue the shareholders individually, and could only obtain payment from them by means of a contribution; and the shareholders themselves were enabled, when not pressed by their creditors, to wind up their affairs without having recourse to the expensive machinery of the Court of Chancery. Under these acts companies with limited liability could only be ordered to be wound up in Bankruptcy; other companies in Chancery (*d*).

Companies act,
1862.

The last-mentioned acts were themselves repealed by the Companies act, 1862, which is now the only act under which companies, not being wound up when the act passed, can be wound up (*e*). There are still some companies the winding up of which commenced before November, 1862, and to which the older acts are even now applicable; but as those acts are rapidly becoming obsolete, it has not been thought desirable to notice them, or the decisions upon them, further than is necessary in order to explain the law of winding up under the Companies act, 1862. For a full account of the law as it stood under the older statutes, the reader is referred to the first edition of the present treatise.

Modes of winding up.

The Companies act, 1862, provides three modes of winding up, viz.—

- 1, compulsorily, or as it is termed by the Court;
- 2, voluntarily, without the intervention of any court; and,
- 3, voluntarily, but subject to the supervision of the Court (see §§ 79, 129, and 147).

Companies registered under the act of 1862, or under the former acts of 1856—1858 (*f*), may be wound up in any of these three ways. Unregistered companies can only be wound up in the first of them (*g*) (see § 199, cl. 2). Each of the above methods requires to be studied separately; but there is so

(*d*) See as to this, *Plumstead Water Co.*, 2 De G. F. & J. 20; *Welsh Potosi Mining Co.*, 27 L. J. Ch. 311, V.-C. K.

(*e*) The 13 & 14 Vict. c. 83, which applies to railway companies authorised to make railways by acts passed prior to the 14th of August, 1850, is still in force, but

is never had recourse to. The only case decided upon it is *Mackenzie v. Sligo, &c., Rail. Co.*, 18 Q. B. 862.

(*f*) *Torquay Bath Co.*, 32 Beav. 581.

(*g*) To this there is one exception. By 25 & 26 Vict. c. 87, § 17, industrial and provident societies registered under that act can be

much common to them all, that in order to avoid repetition it will be convenient to consider the subject of winding up generally under the first head, and then to draw attention shortly to the differences between winding up by the Court and the other modes of winding up. Bk. IV. Chap. 3.

DIVISION I.—WINDING UP BY THE COURT.

SECTION I.—THE COURT HAVING JURISDICTION OVER THE WINDING UP OF A COMPANY.

The court, *i.e.*, the court having jurisdiction to wind up a company under the Companies' act, 1862, is—

1. In the case of companies formed for (*h*) working mines within and subject to the jurisdiction of the Stannaries—the court of the Vice-Warden of the Stannaries (§ 81):

2. In the case of other companies registered in England, or, if unregistered, having a principal place of business there—the High Court of Chancery (§§ 81 and 199, cl. 1) (*i*).

3. In the case of companies registered in Ireland, or, if unregistered, having a principal place of business there—the Court of Chancery in Ireland (*ib.*):

4. In the case of companies registered in Scotland, or, if unregistered, having a principal place of business there—the Court of Session in either division thereof (*ib.*).

If, however, the Vice-Warden of the Stannaries certifies that, in his opinion, a company engaged in working a mine within his jurisdiction would be more advantageously wound up in Chancery, then the court is, even in the case of such a company, the High Court of Chancery (§ 81).

Mines in Stannaries.

wound up voluntarily under the Companies act, 1862.

Weekly N. 112.

(*h*) It is not necessary that the mine should have been worked, *East Botallack Mining Co.*, 34 Beav. 82. As to the concurrent jurisdiction of the Court of Chancery where the company is not formed solely for the above purpose, see *Penhale and Lomax, &c., Co.*, 2

(*i*) To this, however, there is an exception, for the court for winding up an industrial and provident society, registered under 25 & 26 Vict. c. 87, is by § 17 of that act the county court of the district in which the office of the society is situate.

Bk. IV. Chap. 3.
Div. 1. Sect. 1.

Proceedings in
bankruptcy.

Again, the Court of Chancery in England or Ireland, after making an order for winding up a company, may direct all subsequent proceedings for winding up the same to be had in the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate (§ 81), or, if the company is unregistered, in the place where it has a principal place of business (§ 199, cl. 1). When such a direction is given, the Court of Bankruptcy above specified becomes the court for the purposes of winding up the company, and has all the powers of the Court of Chancery (§ 81) (*k*).

Duchy of Lan-
caster.

The Court of Chancery of the Palatine Duchy of Lancaster has power to wind up companies whose registered offices are within the limits of its jurisdiction (*l*). But the jurisdiction of the Palatine Court is not exclusive.

SECTION II.—COMPANIES WHICH CAN BE WOUND UP BY THE COURT, OR SUBJECT TO ITS SUPERVISION.

Div. 1. Sect. 2.

Under the older winding-up acts, questions of considerable difficulty arose with respect to what companies were within their provisions. Thus the 7 & 8 Vict. c. 111, applied only to commercial and trading companies (*m*), and whether the Winding-up act of 1848 applied to companies not falling within the same description, was by no means free from doubt (*n*). The Winding-up act of 1849 greatly extended the operation of the act of 1848. But, notwithstanding the very general word *association*, used in these acts, and although they extended to associations which were neither partnerships nor quasi-partnerships (*e. g.*, to friendly societies, and to associations having for their object the formation of companies), still associations not having gain for their object, and in which there were no shares, and no liability to contribute, were not within the

(*k*) See *Ex parte Hirtzel*, 2 De G. & J. 653.

(*l*) See 13 & 14 Vict. c. 43, and 17 & 18 ib. c. 82, the Court of Chancery of Lancaster acts, 1850 and 1854, and the general orders of that Court of 28 Feb. 1866.

(*m*) See as to these words, *Ex parte Burge*, 1 De G. & S. 588; *Ex parte Spackman*, ib. 599.

(*n*) See *Ex parte Burge*, 1 De G. & S. 588; *Ex parte Spackman*, ib. 599, and 1 Mac. & G. 170.

spirit of the acts. It was accordingly decided that an ordinary club was not within them (o). Such an association has no resemblance to a partnership, quasi-partnership, or inchoate partnership; it is not formed for the division of profit amongst its members; they have no shares, in the sense in which that word is used with reference to partnerships, companies, or associations more or less like them; and even if the members of a club are, as amongst themselves, bound otherwise than in honour to contribute to its debts, there is nothing to prevent any member who has paid his subscription from sending in his resignation, and so getting rid of any such obligation (p).

Bk. IV. Chap. 3.
Div. I. Sect. 2.
Clubs.

The general words partnerships, associations, and companies, were, however, held to include the following—

1. *Projected, but abortive, railway and other companies*, provisionally registered under 7 & 8 Vict. c. 110 (q). But as the subscribers to abortive companies are neither partners nor quasi-partners, it followed that, unless they had done something whereby they had, as between themselves, incurred a liability to contribute to the demands to which they were respectively subject, an order to wind up a company, never in fact formed, was useless; for, except in the case supposed, there could be no contributories (r).

2. *Dissolved companies*, the assets of which had not been divided, or the debts of which had not been paid (s). A dissolved company might be wound up, even although it might have been amalgamated with another company (t), or have been adjudicated bankrupt under 7 & 8 Vict. c. 111 (u).

(o) *St. James's Club*, 2 De G. & G. 169; *Ex parte Besley*, 2 Mac. & G. 383, reversing S. C., 20 L. J. Ch. 630.

& G. 169; *Ex parte Besley*, 2 Mac. & G. 176; *Ex parte Holinsworth*, 3 De G. & S. 7.

(p) See the last note, and as to suits for winding up clubs, *Richardson v. Hastings*, 7 Beav. 301, 323, and 11 ib. 17.

(r) See *Ex parte James*, 1 Sim. N. S. 140; *Ex parte Besley*, 3 Mac. & G. 287.

(q) *Bright v. Hutton*, 3 Ho. Lo. Ca. 341; *Ex parte James*, 1 Sim. N. S. 140; *Ex parte Woolmer*, 5 De G. & S. 117, and 2 De G. Mac. & G. 665; *Ex parte Barber*, 1 Mac. & G. 176; *Ex parte Turner and James*, 3 De G. & S. 127, and 2 Mac.

(s) *Ex parte Phillips*, 3 De G. & S. 3; *Ex parte Dee*, ib. 112; *Warwick and Worcestershire Rail. Co.*, 13 Jur. 651.

(t) *Ex parte Phillips*, 3 De G. & S. 3; *Ex parte Dee*, ib. 112.

(u) See as to this, *ante*, p. 1213, note (c).

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Div. 1. Sect. 2.

3. *Foreign companies*.—Companies formed for carrying on business abroad, but the management of which is subject to the control of persons resident in this country (*x*). Irish companies were specially provided for by 4 & 5 Vict. c. 45, § 17 (*y*). Scotch companies were not subject to the acts at all (*z*).

4. *Friendly societies*, *e. g.*, a benefit building society (*a*), a loan society (*b*).

5. *Incorporated companies*, other than railway companies (*c*).

6. *Mutual insurance companies* (*d*).

7. *Scrip companies* (*e*).

The decisions in some of these cases may still be useful.

Cost-book
mining com-
panies.

Companies formed on the cost-book principle for working mines within the jurisdiction of the Stannaries may be wound up under the Companies act, 1862. The law as to winding up these companies was formerly in a very unsatisfactory state (*f*).

(*x*) *e. g.*, a Spanish Rail. Co., *Ex parte Turner and James*, 3 De G. & S. 127, and 2 Mac. & G. 169; a German Mining Co., *Ex parte Chippendale*, 2 De G. Mac. & G. 19; a Mexican Mining Co., *Barclay's case*, 26 Beav. 177; a Calcutta Bank, see *Ex parte Watson*, 3 De G. & S. 253, where, however, no order was made; an Indian Rail. Co., *Ex parte Wolesey*, 3 De G. & S. 101; a Belgian Rail. Co., *Ex parte Moss*, 14 Jur. 754.

(*y*) See *Ex parte Fisher*, 3 De G. & S. 116.

(*z*) 11 & 12 Vict. c. 45, § 127, and 12 & 13 Vict. c. 108, § 40.

(*a*) *Re St. George's Building Societies*, 4 Drew. 154.

(*b*) *Ex parte Smith*, 1 Sim. N. S. 165. See *Crown and Cushion Loan Fund Soc.*, 14 Jur. 874.

(*c*) *e. g.*, Electric Telegraph Companies incorporated by statute, 22 Beav. 471, and see 24 Beav. 318. Canal Companies, see *Ex parte Croysdill*, 7 De G. Mac. & G. 199, *note*.

(*d*) *Ex parte Phillips*, in *Re London and Westminster Insurance Co.*, 3 De G. & S. 3. See the special report made by the Master in this case, 14 Jur. 929.

(*e*) *Barclay's case*, 26 Beav. 177; *Ex parte Grisewood*, 4 De G. & J. 544.

(*f*) They were, if formed for working mines in Cornwall, wholly excepted from the act of 1848, as it originally stood, see 11 and 12 Vict. c. 45, § 2; *Ex parte Wyld*, in *Re Wheal Lovell Mining Co.*, 1 Mac. & G. 1. Provision was, however, afterwards made for winding them up in chancery in certain specified cases, 12 & 13 Vict. c. 108, § 1; 20 & 21 Vict. c. 78, § 12. See on this subject, *Bosworthon Mining Co.*, 26 L. J. Ch. 612; *Wheal Anne Mining Co.*, 10 W. R. 330; and as to the right of creditors to oppose, see *Trefoil and Messer Mining Co.*, 2 J. & H. 421. Cost-book companies formed for working mines in Devonshire might be wound up in chancery even under the act of

Under the Companies act, 1862, the following companies may be wound up by the Court, or subject to its supervision :—

Bk. IV. Chap. 3.
Div. 1. Sect. 2.

Companies capable of being wound up under the act of 1862.

1. All companies registered under the act, whether formed under it or not (see §§ 79, 180, and 196).

2. All companies registered under the acts of 1856—1858 (see § 176 and 177).

3. All other partnerships, associations, or companies, except railway companies, incorporated by act of Parliament, consisting of more than seven members (see § 199).

What companies can be registered under the act and what not, has been pointed out in a former page (*g*); and it is only necessary to observe that any company or association of persons which is capable of being registered at all, may be registered for the purpose only of being wound up (*h*).

Whether railway companies incorporated by act of Parliament can be wound up under the act in question, is not quite clear. If, as is apparently the case (*i*), they can be registered under the act, it follows that when registered they can be wound up under it. But it is plain (from § 199) that they cannot be so wound up unless they are registered, and if they cannot be registered there is no act under which they can be wound up at all unless it be 13 & 14 Vict. c. 83, which only applies to those railway companies which were authorised to make their railways by acts passed prior to 14th August, 1850 (*k*).

Railway companies.

Illegal companies (*l*) cannot be wound up at the instance of their own members (*m*); but there is no reason why they

Illegal companies.

1848, see *South Lady Bertha Copper Mining Co.*, 2 J. & H. 376. Companies formed on the cost-book principle, but not for working mines within the jurisdiction of the Stannaries, were clearly within the winding-up acts of 1848 and 1849.

(*g*) *Ante*, pp. 166, *et seq.*

(*h*) 25 & 26 Vict. c. 89, § 180. See *Northumberland and Durham Banking Co.*, 2 De G. & J. 357, and *Liverpool Borough Bank v. Mellor*, 3 H. & N. 551, as to registering

banking companies governed by 7 Geo. 4, c. 46, in order that they may be wound up. Both of these cases turned on the acts of 1856–8.

(*i*) *Ante*, p. 168, note (*m*).

(*k*) See *ante*, p. 1214, note (*e*).

(*l*) As to which, see *ante*, pp. 178, *et seq.*

(*m*) See *Barclay's case*, 26 Beav. 177; *Fenn's case*, 4 De G. Mac. & G. 295; *Ex parte Longworth's Executors*, Johns. 465, affirmed on appeal, 1 De G. F. & J. 17.

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Div. 1. Sect. 2.

should not be wound up at the instance of creditors; nor is there anything to prevent their being wound up by their own members without any judicial assistance. Moreover, it must be remembered that if a company is illegal simply because it is not registered, the impediment to being wound up can be removed by registration. A company, however, which is required by the act to be registered under it, cannot, whilst unregistered, be wound up by the Court at the instance of a member (*n*).

Foreign com-
panies.

A company formed and registered under the act can be wound up under it, although the members of the company may be wholly or mainly foreigners resident abroad, and although the objects of the company may be the transaction of business abroad. If, however, such a company has little or no assets, and few, if any, solvent members in this country, a winding-up order would be of little if any use.

With respect to foreign companies formed abroad for the purpose of transacting business abroad, and governed by foreign law, there is more difficulty. The writer apprehends that it is not competent for any court in this country to dissolve a corporate body created by a competent foreign authority; and a foreign corporation, therefore, cannot be wholly wound up and dissolved in this country. But there does not appear to be anything in the Companies act, 1862, nor any general principle of law which prevents a foreign company, whether incorporated or not, from being registered under that act, and from being wound up under it when registered. Nor is there any reason why an unincorporated foreign company should not be wound up in this country if there are any assets or members within the jurisdiction of its courts. If a foreign incorporated company were registered, the corporate body created by registration might be wound up and dissolved without any undue exercise of jurisdiction.

Remarks on
§ 199.

The 199th section of the Companies act, 1862, is expressed in terms sufficiently large to include all unregistered societies and corporations of whatever kind consisting of more than seven members, with the single exception of railway companies

(*n*) *Waterloo Life Insurance Co.*, 31 Beav. 586.

incorporated by act of Parliament (o). But the general scope of the winding-up acts shows that there are corporations aggregate to which the winding-up provisions of the Companies act, 1862, have no application: *e. g.*, municipal corporations, ecclesiastical corporations aggregate, and societies such as the Royal Society, incorporated by royal charter for the advancement of science. The property of all such corporations is liable to their debts, but their members are not personally liable to pay or to contribute to the payment of such debts; nor have the members any rights *inter se* analogous to those which are capable of being adjusted in the course of winding up.

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Div. 1. Sect. 2.

SECTION III.—PERSONS AT WHOSE INSTANCE A WINDING-UP ORDER WILL BE MADE.

Under the Companies act, 1862, an order for winding up a company may be applied for by all or any of the following persons, viz.:—

Div. 1. Sect. 3.

1. The company;
2. One or more of its creditors;
3. One or more of its contributories;

and every order made on any petition operates in favour of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory (§ 82).

A company required to be registered is not entitled whilst unregistered to apply for an order to be wound up (p).

Any creditor of a company is entitled to petition for a winding-up order, and it is not necessary that his debt should be of any particular amount; but, as will be pointed out in the next section, the evidence which he must adduce in support of his

(o) A canal company incorporated by act of Parliament has been ordered to be wound up under the act of 1862, see *Wey and Arun Junction Canal Co.*, 2 Weekly N. 100; *Basingstoke Canal Co.*, 1 ib. 251.

So a ferry company, see *Isle of Wight Ferry Co.*, 2 Hem. & M. 597. See under the older acts, *ante*, p. 1218.

(p) See § 210, and *Waterloo Insurance Co.*, 31 Beav. 586.

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Div. 1. Sect. 3.

petition depends on the amount of his debt. An assignee of a debt is entitled to petition (*q*).

Contributories.

Alleged contributories.

The meaning of the word contributory will be examined hereafter; for the present purpose the term includes an alleged contributory (see § 74). But the legislature has not said, and the courts have not decided, what sort of allegation is to be regarded as sufficient (*r*). It may, however, be remarked, that several of the older cases in which orders were made under the Winding-up act of 1848 on the petition of the subscribers to abortive companies could not be supported at the present day, upon the ground that the petitioners in them were contributories; if those cases are to be supported at all, it must be upon the ground that the petitioners claimed to be contributories, without being so in reality (*s*).

Holders of fully paid up shares in limited companies.

Inasmuch as a holder of fully paid up shares in a limited company is not, under any circumstances, liable to contribute to its debts, a question has arisen whether such a person is entitled to petition for a winding-up order. The better opinion, however, seems to be that he is; at least, unless it can be shown that the company is in such a state of insolvency that there is no probability of anything being left for the shareholders (*t*).

Scrip-holders.

A scrip-holder is not entitled to petition for a winding-up order unless he is, or admits himself to be, a contributory (*u*), or unless there are surplus assets which he has a right to have distributed.

The following persons were held entitled to petition under the Winding-up acts of 1848 and 1849; and the decisions in their cases may be usefully referred to on questions arising under the act of 1862:—

(*q*) *London and Birmingham Alkali Co.*, 1 De G. & J. 257.

(*r*) See as to persons claiming to be contributories under the act of 1848, *Times Fire Ins. Co.*, 30 Beav. 596.

(*s*) That the petitioners in *Ex parte Capper*, 3 De G. & S. 1; *Ex parte Cooke*, ib. 148, and *Ex parte Holinsworth*, ibid. 7, would not at the present time be held to be contributories, see *Bright v. Hutton*, 3 Ho. Lo. Ca. 341.

(*t*) *National Savings Bank*, L. R. 1 Ch. App. 547; *London Armoury Co.*, 10 Jur. N. S. 962 R.; *Lancashire Brick and Tile Co.*, 34 Beav. 330; *Patent Artificial Stone Co.*, ib. 185; *Cheshire Patent Salt Co.*, 1 New R. 533, V.-C. K.

(*u*) *Littlehampton Steam Ship Co.*, 34 Beav. 256, and 2 De G. J. & S. 521, Turner, L. J., dissenting. See under the older acts, *Ex parte Capper*, 3 De G. & Sm. 1.

A scrip-holder of a provisionally registered railway company, who had not signed either the subscribers' agreement or the parliamentary contract (*x*);

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Div. 1. Sect. 3.

An original subscriber for shares in an abortive company, and a member of its provisional committee (*y*);

A member of the managing committee of an abortive company, who had been compelled to pay the charges of the company's solicitor, but who had not taken any shares (*z*);

A member of a company who had not paid his calls (*a*);

A manager of a cost-book company, who was a creditor of the company for advances made by himself (*b*);

A contributory resident abroad (*c*);

The executors of a deceased member, though not members themselves (*d*);

Past members (*e*).

Where a petition was presented by a shareholder who had entered into an arrangement with his creditors under the Bankrupt act, an order was refused, the trustees of the deed of arrangement not having been served (*f*).

SECTION IV.

The circumstances under which a compulsory winding-up order will be made.

A company registered under the act may be wound up by the Court, *i. e.*, compulsorily under the following circumstances (§ 79):—

Div. 1. Sect. 4.

Circumstances
under which
company may be
wound up.

1. Whenever the company has passed a special resolution, requiring the company to be wound up by the Court;

a) When registered.

(*x*) *Ex parte Capper*, 3 De G. & S. 949.
S. 1.

(*y*) *Ex parte Holinsworth*, 3 De G. & S. 7.

(*z*) *Ex parte Cooke*, 3 De G. & S. 148.

(*a*) *Ex parte Lawton*, 1 K. & J. 204; *Ex parte Hodsell*, 19 L. J. Ch. 234. See, too, *Sherwood Loan Co.*, 1 Sim. N. S. 165.

(*b*) *Ex parte Sedgwick*, 2 Jur. N.

(*c*) *Ex parte Latta*, 3 De G. & S. 186. But he may be compelled to give security for costs, *ibid*.

(*d*) *Re Norwich Yarn Co.*, 12 Beav. 366.

(*e*) *Times Fire Insurance Co.*, 30 Beav. 596.

(*f*) *Ex parte Walter*, 3 De G. & S. 2.

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Div. 1. Sect. 4.

2. Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year ;

3. Whenever the members are reduced in number to less than seven ;

4. Whenever the company is unable to pay its debts ;

5. Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

b) When unregistered.

An unregistered company may be wound up (§ 199, cl. 3)—

1. Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs ;

2. Whenever the company is unable to pay its debts ;

3. Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

Inability to pay debts.

The act declares the circumstances under which a company is to be deemed unable to pay its debts, both where the company is registered (§ 80), and where it is not (§ 199, cl. 4). These circumstances are, in the case of registered companies, in substance as follows (§ 80) :

a) In case of registered companies.

1. Whenever a creditor for more than 50% has served on the company a demand, under his hand, requiring the company to pay the sum due, and the company has for three weeks afterwards neglected to pay, or secure, or compound for the same to the creditor's satisfaction ;

2. Whenever execution, issued by a judgment creditor against the company, is returned unsatisfied ;

3. Whenever it is proved, to the satisfaction of the Court, that the company is unable to pay its debts.

b) In case of unregistered companies.

In the case of unregistered companies, two other circumstances are added (g) (§ 199, cl. 4), viz. :

1. Whenever a member is sued for a debt of the company, and notice of the proceeding is served on the company, and the company has not within ten days paid, secured, or compounded for the debt, or procured the proceeding to be stayed, or indemnified the defendant to his satisfaction against the same, and the costs thereof ;

(g) The substance only of the section is attempted to be here given.

2. Whenever, in the case of a company working a mine within the jurisdiction of the Stannaries, a customary decree or order absolute for the sale of the effects of the mine has been made, in a creditor's suit, in the Vice-Warden's Court.

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 Div. 1. Sect. 4.

In connection with the above enactments, it is necessary to advert to section 86, which empowers the Court, upon hearing a petition for a winding-up order, to dismiss the same with or without costs, adjourn the hearing conditionally or unconditionally, or make any interim or other order that it deems just.

Discretion of
 court.

Moreover, by sections 91 and 149, the Court is empowered to have regard to the wishes both of the contributories and of the creditors, and to have meetings called in order to ascertain such wishes. It is obvious, from the foregoing provisions, that in all cases the Court has a very wide discretion as to what it will do when applied to for an order to wind up. But wide as the discretion is, there are certain principles by which the Court is guided, and which reduce the practice on this subject to reasonable certainty. These principles will be best expounded by considering first the circumstances under which the act declares that a winding-up order may be made, and secondly the circumstances by which the Court is usually influenced in exercising its discretion as to the course it will pursue.

1. *Circumstances under which a winding-up order may be made.*

No company can be wound up by the Court except in the cases specified in §§ 79 and 199 (*h*), and of these the only one which gives rise to difficulty is the last, which is thus expressed: "*Whenever the court is of opinion that it is just and equitable that the company should be wound up.*" It is obvious, from the context of the act, that these words were only intended to apply to cases other than those previously enumerated; and it has been decided that, wide as the words are, they only apply to cases to some extent resembling those before described. Unless, therefore, a company can be brought within one or more of the previous specific provisions, or unless there are questions to be settled and rights to be adjusted which can

Just and equita-
 ble to wind up.

(*h*) See *ante*, pp. 1223, 4.

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only be settled and adjusted by converting into money the assets of the company, whether actual or raiseable by calls, and by discharging the company's liabilities, distributing the surplus assets and finally dissolving the company, the Court will not order it to be wound up at all.

Ex parte
Spackman.

One of the earliest cases on this subject is that of *The Agriculturist Cattle Insurance Company* (i), which came before Lord Cottenham. It was there laid down that the general power given to the Court to wind up a company under any circumstances which, in the opinion of the Court, render it just and equitable so to do, ought only to be exercised in the case of a company shown to be in a state of pecuniary embarrassment. His lordship observed upon the clause in question (which was contained in the Winding-up act of 1848), that it "was no doubt thus worded, in order to include all cases not before mentioned; but, of course, it cannot mean that it should be interpreted otherwise than in reference to matters *ejusdem generis* as those in the previous clauses. There must be something in the management and conduct of the company which shows the Court that it should no longer be allowed to continue, and that the concern ought to be wound up." In the case now referred to, the Court refused to wind up an insurance company from which a considerable number of dissatisfied shareholders had retired, but which was being carried on by the others with a reasonable prospect of success.

Misconduct on
part of directors.

In conformity with these principles it was held, under the older acts, that where the object of the petitioner was to make directors or others account to the company for the misapplication of its assets, or to make good losses for which they were properly liable to the company, the Court would leave the petitioner to such remedies as he might have by bill or otherwise, and would not make a winding-up order unless the liabilities of the company were such as to render it necessary or expedient to have recourse to a general winding up (k).

(i) 1 Mac. & G. 170. See, also, the judgments in *Ex parte Wyld*, 1 Mac. & G. 1; *Ex parte Wise*, 1 Drew. 465, both noticed *infra*, p. 1230. See also the other cases referred to in the summary of cases

at the end of this section, under the head, "Petition dismissed, Company not Insolvent."

(k) See *Ex parte Wise*, 1 Drew. 465, *infra*, p. 1230.

These principles of construction are as applicable to the Companies act, 1862, as to the older acts. Thus, in the case of *The Anglo-Greek Steam Company* (l), a petition was dismissed although the petitioner complained of the manner in which the company had been got up, and of misconduct on the part of the directors, and of the large sums of money which had been secretly paid to them as promoters. There was no evidence that the company was a mere bubble company, or was in embarrassed circumstances, or that it might not prosper with prudent management. The petitioner's remedy, therefore, was by a suit in equity against the directors, not by a petition to wind up the company.

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Anglo-Greek
 Steam Company.

At the same time, the judgments delivered in these two leading cases show that if a company is formed for the dishonest purpose of benefiting the promoters at the expense of the members, the Court will order such company to be wound up, although it may not be in insolvent circumstances. Accordingly, in a recent case of this description, the V.-C. Wood ordered a company to be wound up at the instance of a contributory, although the company had only existed three or four months, and although it consisted of only eleven members, and although the majority of them desired to go on, and although it was not proved that the company was unable to pay its debts (m). The evidence showed that it would be unjust and inequitable to allow the company to go on.

Fraudulent
 companies.
 London and
 County Coal
 Company.

2. *Circumstances influencing the discretion of the Court.*

Assuming that circumstances are proved to exist under which a company may be ordered to be wound up, it by no means follows that it will be ordered so to be (n). The Court, as already observed, has in all cases a wide discretion as to the course it will take; and in the exercise of this discretion a marked difference exists between cases in which a winding-up order is sought by creditors and those in which it is sought by contributories.

When a petition is presented by a creditor for an order to

1. Creditor's
 petitions.

(l) L. R. 2 Eq. 1.

(m) *London and County Coal Co.*,
 L. R. 3 Eq. 355.

(n) See this very clearly laid
 down in *Metropolitan Saloon Omni-*
bus Co., 5 Jur. N. S. 922.

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wind up a company, and his debt is not disputed, or has been established by legal proceedings, and there is evidence that the company is unable to pay its debts within the meaning of the statute, it is almost a matter of course to make the order. The opposition of the company, or the wishes of the contributories, go for little in such a case (*o*); nor does the fact that the contributories desire to wind up voluntarily (*p*) usually induce the Court to abstain from making a compulsory order. The smaller, moreover, the assets of the company, the less reason is there to attend to the wishes of the contributories; for where a company is clearly insolvent, its assets may be regarded as belonging rather to its creditors than to its members (*q*).

Creditors divided in opinion.

If, however, the Court is satisfied by proper evidence that the great bulk of the creditors of a company are of opinion that a compulsory order to wind up is not desirable, the Court will give effect to their wishes (*r*); although where there had been ample time to consult them, and they had not been called together, and had not expressed their wishes in such a way as to satisfy the Court, the opposition of a considerable number of them did not induce the Court either to refuse the order, or even to direct the petition to stand over until the creditors could be called together (*s*).

Again, if the petitioning creditor has assigned or incumbered his debt, so as to have little, if any, interest in it, the Court will be reluctant to make an order at his instance (*t*).

Disputed debt.

Further, it was never intended that a petition to wind up a company should be had recourse to for the purpose of trying a disputed debt, and if the petitioner's debt is *bonâ fide* disputed the Court will either dismiss the petition at once (*u*),

(*o*) See the next two notes, and *Consolidated Bank*, 1 Weekly N. 232.

(*p*) *General Rolling Stock Co.*, 34 Beav. 314.

(*q*) *Isle of Wight Ferry Co.*, 2 Hem. & M. 597.

(*r*) *Oriental Commercial Bank*, 1 Weekly N. 283. *The Imperial Mercantile Credit Association*, ib. 257, was decided on a contributory's petition.

(*s*) See the cases in the last note, and *General Rolling Stock Co.*, 34 Beav. 314.

(*t*) *European Banking Co.*, 1 W. N. 254, where the petition was dismissed.

(*u*) *London Wharfing and Warehousing Co.*, 35 Beav. 37, where twenty-one days after demand had elapsed; *Catholic Publishing Co.*, 2 De G. J. & Sm. 116, where they had not.

or at least not make a winding-up order, until the debt has been established (*x*).

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Even if the petitioner has obtained judgment against the company, still if there is evidence to show that the judgment was obtained by fraud, and the petitioner declines an inquiry on the subject, his petition will be dismissed (*y*). At all events, a winding-up order ought not to be made in such a case without giving the company an opportunity of impeaching the judgment.

It is not necessary that the petitioning creditor's debt should amount to 50*l.*; but, if it is of less amount he must show that the company is unable to pay its debts by some other evidence than non-payment of himself within three weeks after demand. A judgment debt of less than 50*l.* followed by an unsatisfied execution has been decided to be sufficient (*z*). If non-payment within three weeks after demand is relied upon, that period must have expired before the presentation of the petition (*a*).

Amount of
 debt.

Inability to pay debts is, in a creditor's petition, the ground generally relied upon for obtaining a winding-up order; but a creditor's petition may be supported on any of the other grounds mentioned in the statute. These will be more fully referred to hereafter.

Grounds of
 petition.

When a petition to wind up a company compulsorily is presented by a contributory, it has long been settled that the Court will take into consideration not only the question whether the company is brought within one or more of the statutory provisions under which it may be wound up, but also whether an order to wind up is necessary or expedient having regard to the interests of the shareholders generally (*b*).

2. Contributo-
 ries' petitions.
a) Under older
 acts.

An early and leading case on this subject is that of *The*

(*x*) *Rhydydefed Colliery Co.*, 3 De G. & J. 80; *Inventors' Association*, 2 Dr. & Sm. 553. See, also, *Brighton Club and Norfolk Hotel Co.*, 1 Weekly N. 362.

(*y*) *Hope Mutual Life Assurance Co.*, 1 N. R. 542, L. J., and *Bowes v. Same Co.*, 11 Ho. Lo. Ca. 389.

(*z*) *London and Birmingham Alkali Co.*, 1 De G. & J. 257.

(*a*) *Catholic Publishing Co.*, 2 De G. J. & Sm. 116.

(*b*) See, in addition to the cases noticed, *infra*, *Metropolitan Saloon Omnibus Co.*, 5 Jur. N. S. 922. In *Ex parte Goldsmith*, 14 Jur. 734, V.-C. Wigram seems to have thought that the act of 1848 was more imperative than it really was.

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Ex parte Wyld.

Wheal Lovell Mining Company (c). There a shareholder in a cost-book company refused to pay his calls, and he was accordingly sued at the instance of the company by one of its creditors, whereupon he petitioned for a winding-up order, relying on the 5th clause of the 5th section of 11 & 12 Vict. c. 45. He had given the notice required by the act, so as to bring himself within its words; but it was held that the act was not intended to be made use of for the purpose of settling controverted points between a company and one of its shareholders. There was no evidence to show that the company was in pecuniary difficulties, or that there was any occasion for winding it up, and consequently the petition, although entertained by the Court below, was, on appeal, dismissed with costs. In this same case it was held by Lord Cottenham that the Winding-up act of 1848 was not intended to apply to companies which are solvent, carrying on their business, and, if not prosperous, at all events able to meet their pecuniary engagements. He considered that the act was intended to apply only to companies failing to answer the purpose for which they were created.

Ex parte Wise.

In another important case also turning on the act of 1848, it was treated as clear that the Court ought not to order a company to be wound up simply because a petition was presented by a qualified person, and the company was proved to be within one of the provisions of the act. In the case in question it is laid down that the Court is bound to consider, with reference to each company, whether it is necessary or expedient to apply to it the machinery of the Winding-up acts; that in order to determine this point, the first question to be asked is, To what liabilities are the petitioners in particular, and the shareholders generally, exposed? that, although it is true that when a company is being wound up, the proceedings are not merely for the discharge of its debts, but may embrace the administration of equities between the shareholders, that is not the principal object of the Winding-up acts; and that their object is, not so much to administer internal equities between the shareholders, as to prevent one shareholder from

(c) *Ex parte Wyld*, 1 Mac. & G. 1.

being compelled to pay more than his proper share of the debts of the company (*d*). The principles here enunciated are still applicable to unregistered companies, although not so strongly as before to companies which are registered, and whose members are not liable to be individually sued by creditors.

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Even where a company was under heavy liabilities, and had ceased to carry on its business, the Court would not order it to be wound up under the acts of 1848 and 1849 if measures were being taken to wind up its affairs out of court, and there was good reason to suppose that its liabilities would be discharged, and its assets divided as satisfactorily without the interference of the Court as with it (*e*).

Company winding up out of court.

The discretion entrusted to the Court by the Companies act, 1862, is certainly not more restricted than that which it possessed under the older acts (*f*); and in exercising that discretion, when a winding-up order is sought by a contributory, the Court is not only guided by the principles expounded above, but also by the wishes of the majority of the shareholders. Even where it is agreed on all hands that the company must be wound up, the Court will, as a rule, refuse to order it to be wound up compulsorily at the instance of a contributory, if the majority of other shareholders prefer to wind up voluntarily, or subject to the supervision of the Court, and *bonâ fide* intend so to do (*g*). If a resolution to wind up voluntarily has been duly passed, it is, to say the least, doubtful whether the Court has the power to order the company to be wound up compulsorily upon a contributory's petition; the common opinion is that it has not (*h*).

b) Under the Companies act, 1862.

(*d*) See the judgment of V.-C. Kindersley, in *Ex parte Wise*, in *Re London Conveyance Co.*, 1 Drew. 465.

(*e*) *Ex parte Wise*, 1 Drew. 465; *Ex parte Watson*, 3 De G. & S. 4; *Ex parte Guest*, 5 ib. 458; *Re Monmouthshire and Glamorganshire Banking Co.*, 15 Beav. 74. See, too, *Ex parte Phillipps*, 1 Sim. N. S. 605, where a suit was pending.

(*f*) See §§ 86, 91 149 of the act of 1862.

(*g*) See *London Mercantile Discount Co.*, L. R. 1 Eq. 277; *St. David's Gold Mining Co.*, 1 W. N. 196, V.-C. K.; *Imperial Mercantile Credit Association*, 1 W. N. 257, V.-C. W., (Doyle's petition); *General International Agency Co.*, 5 N. R. 265.

(*h*) See, accordingly, *Bank of Gibraltar and Malta*, L. R. 1 Ch. App. 69. But see contra, *Fire Annihilator Co.*, 32 Beav. 561. This question turns on the true con-

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London and Mer-
cantile Discount
Company.

In a recent important case such a resolution had been passed, and liquidators had been appointed; and some of the members afterwards petitioned the Court complaining of misconduct on the part of the directors, and of partiality on that of the liquidators, and praying that the company might be wound up compulsorily or subject to the supervision of the Court. The petition was directed to stand over in order that the shareholders might be consulted as to taking proceedings against the directors. As, however, they and their friends had a majority of votes, the petitioners deemed it useless to call a meeting, and the petition was ultimately dismissed (*i*). The Court held that the votes of the directors and of their friends could not be disregarded in the absence of evidence showing the exercise of undue influence by the directors in procuring votes in their own favour (*k*).

West Surrey
Tanning Com-
pany.

In another case, however, where a member petitioned for a winding-up order and complained of an improper purchase by the company from one of the directors who had such a preponderating influence in the company that no resolution adverse to him had been passed, the Court made a compulsory order, although a meeting had been convened for winding up the company voluntarily, and such meeting stood adjourned (*l*).

Very small
companies.

Although one of the circumstances under which a company may be wound up by the Court is when the members are less than seven in number, the Court will not, at the instance of a contributory, order a company with very few members to be wound up compulsorily if a voluntary winding up is desired, and there are no circumstances showing that the company will not be fairly wound up voluntarily (*m*). But if the question is

struction of sections 79, 129, and 145 of the Companies act, 1862. See, also, § 170, and rule 74. See, also, *Imperial Bank of China, India, and Japan*, L. R. 1 Ch. App. 339.

(*i*) *London and Mercantile Discount Co.*, L. R. 1 Eq. 277. See, also, *Gibraltar and Malta Bank*, L. R. 1 Ch. App. 69, and *St. David's Gold Mining Co.*, 1 Weekly N. 196, V.-C. K.

(*k*) See, also, as to disregarding votes in such cases, *East Pant Du Mining Co.*, 2 Hem. & M. 254.

(*l*) *West Surrey Tanning Co.*, L. L. 2 Eq. 737.

(*m*) *Natal Co.*, 1 Hem. & M. 639, where there were nine shareholders; *Sea, River, and Marine Insurance Co.*, 1 Weekly N. 253, where there were seven. In both of these cases the petitions were dismissed with costs.

whether the company shall be wound up or go on, and the Court thinks it ought to be stopped, the small number of the members is no reason why a compulsory order should not be made (*n*).

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Where, in the case of a limited company, a contributory seeks for a winding-up order, and the majority of the members are of opinion that there is a reasonable prospect of carrying on the business of the company with success, and they oppose the application on this ground, the Court will give effect to their wishes and decline to make a winding-up order (*o*); unless the company is a fraudulent company which ought to be stopped (*p*). In the case of an unlimited company, however, the risk to individual members entitles a minority to a winding-up order, if the capital of the company has been called up and spent and the company is seriously in debt, and is carrying on business at a loss (*q*).

Majority of members desiring to go on.

Although the act declares that a company may be wound up if it does not commence business within a year from its incorporation, or if it suspends its business for the space of a year, yet, a company which has transferred its business to another company and has ceased to carry on business itself only by reason of such transfer, will not be ordered to be wound up unless there are other grounds for the order in addition to suspension of business (*r*). If, however, the company which has transferred its business is unable to pay its debts, and the company which has taken its business does not discharge them, an order to wind up the first company will be made (*s*).

Companies amalgamated with others.

It may here be observed, that if a company has passed a resolution to wind up voluntarily, and has transferred its

Amalgamation under §§ 161 and 162.

(*n*) *London and County Coal Co.*, L. R. 3 Eq. 355, ante, p. 1227.

N. 243; *British Provident Assur. Society*, 1 Dr. & Sm. 113.; *Anglo-Australian Assurance Co.*, 1 Dr. & Sm. 113, where the petitioner had concurred in the amalgamation; *Ex parte Cookson*, 15 Jur. 615.

(*o*) *Hop and Malt Exchange Co.*, 1 W. N. 222; *Factage Parisien Co.*, 10 Jur. N. S. 121, L. J. See, also, *Metropolitan Saloon Omnibus Co.*, 5 Jur. N. S. 922, L. J.

(*s*) *Ex parte Lawton*, 1 K. & J. 201, where the petitioner was being sued by the creditors. See, also, *Pennant and Craigwen Mining Co.*, 15 Jur. 1192; *Ex parte Dee*, 3 De G. & Sm. 112; *Ex parte Phillips*, 3 De G. & Sm. 3.

(*p*) *London and County Coal Co.*, 3 Eq. 355.

(*q*) See *Norwich Yarn Co.*, 12 Beav. 366; *Electric Telegraph Co. of Ireland*, 22 Beav. 471.

(*r*) *National Finance Co.*, 1 W.

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Preliminary
inquiries.

business to another company, under §§ 161 and 162 of the Companies act, 1862, and a contributory is desirous of impeaching the validity of such transfer, he can only do so by a bill. If he petitions for leave to file such a bill and for a compulsory winding-up order, the petition will not be dismissed but will be ordered to stand over with leave to file a bill if the Court is satisfied by the evidence before it that there are reasonable grounds for impeaching the transactions complained of (*t*).

Under the Winding-up act of 1848, § 12, the Court was expressly empowered to direct preliminary inquiries before finally disposing of a petition to wind up. This power is also exerciseable under the Companies act, 1862, and in several cases petitions have been directed to stand over, in order that meetings might be held and the wishes of the creditors and contributories ascertained (*u*). At the same time it was decided under the older acts, and the same rule applies now, that no preliminary inquiries ought to be directed unless the Court feels unable to come to a satisfactory conclusion as to the proper course to take; nor unless it is also satisfied that further inquiry will enable it to form a more correct or decisive opinion (*x*). It has already been seen that where there has been ample opportunity to ascertain the views of creditors or contributories, the Court will not allow further time for the purpose, unless there is some special reason for so doing (*y*). And where the contributories have already had a meeting and expressed their wishes, a further meeting will not be directed simply because the first may not have been altogether regular (*z*).

(*t*) See *Imperial Bank of China, India, and Japan*, L. R. 1 Ch. App. 339.

(*u*) See *infra*, 1240. Cases in which petitions stand over for such a purpose are not usually reported.

(*x*) See *Re Sherwood Loan Society*, 1 Sim. N. S. 165; *Ex parte Pocock*, 1 De G. & S. 731; *Re Monmouthshire and Glamorganshire Banking Co.*, 15 Beav. 74; *Ex parte Troutbeck*, 13 Jur. 157. In *Re The Great Eastern and Western Rail. Co.*, 3 De G. & Sm. 218, the petition was un-

opposed; but it was intimated that it would be well if no winding-up order were to be made on an unopposed petition, without a preliminary inquiry, as it had been found that such orders would very often not have been made if the Court had been more fully informed of the facts. This, however, is not the usual practice.

(*y*) *Oriental Commercial Bank*, 1 Weekly N. 283.

(*z*) *Imperial Mercantile Credit Association*, *ib.* 257.

Summary of cases.

The decisions bearing on the subject above considered are both numerous and important, but after the foregoing observations it will be sufficient to notice them very shortly, and this may best be done by collecting them into three groups, as follows:

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Analysis of the
 decisions on this
 subject.

1. Cases in which a compulsory winding-up order has been made.
2. Cases in which a compulsory winding-up order has been refused.
3. Cases in which a compulsory winding-up order has been deferred.

The cases in which an order to wind up subject to supervision has been made in preference to a compulsory order will be noticed hereafter (a).

1. ORDER MADE.

A. *Creditors' petitions.*

General Rolling Stock Co., 34 Beav. 314.

Company unable to pay its debts. Members desired to wind up voluntarily, and some creditors supported them.

Isle of Wight Ferry Co., 2 Hem. & M. 597.

Company incorporated by act of Parliament, and petitioning for further powers, but utterly insolvent, and alleged to have no saleable assets at all.

Oriental Commercial Bank, 1 Weekly N. 283.

Company insolvent—voluntary winding up desired by majority of contributories, and by some of the largest creditors.

B. *Contributories' petitions.*

West Surrey Tanning Co., L. R. 2 Eq. 737.

Company doing no business—circumstances to be investigated—voluntary winding up proposed, but one director able to carry everything as he liked.

Fire Annihilator Co., 32 Beav. 561.

Voluntary winding up going on for five years, and not ended. See obs. ante, p. 1231, note (h).

London and County Coal Co., L. R. 3 Eq. 355.

Company only three or four months old; formed dishonestly; the directors themselves not paying anything on their shares,

(a) *Infra*, Div. 2.

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Analysis of cases.

1. Order made.

and defraying the expenses out of money obtained from an unwary secretary who had taken and paid for shares in order to secure his appointment.

Metropolitan Railway Warehouse Co., 2 Weekly N. 94.

Company unable to commence business within a year.

Ex parte Latta, 3 De G. & Sm. 186.

Pennant and Craigwen Mining Co., 15 Jur. 1192.

Ex parte Sedgwick, 2 Jur. N. S. 949.

South Lady Bertha Mining Co., 2 J. & H. 376.

Tretoil and Messer Mining Co., 2 J. & H. 421.

Times Fire Insurance Co., 30 Beav. 596.

In all these cases the petitioner was being or had been sued by a creditor of the company, whom the company either could not or would not pay. See, also, the *Bosworthon Mining Co.*, 26 L. J. Ch. 612, M. R., where, however, an inquiry was first directed, in order to ascertain whether the petitioner had paid more than he owed the company.

Ex parte Holinsworth, 3 De G. & S. 7.

Ex parte Turner and James, ib. 127, and 2 Mac. & G. 169.

Ex parte Cooke, 3 De G. & S. 148.

Ex parte Barber, 1 Mac. & G. 176.

Ex parte Woolmer, 5 De G. & S. 117, and 2 De G. Mac. & G. 665.

Ex parte Goldsmith, 14 Jur. 734.

Larne, Belfast, &c., Rail. Co., ib. 996.

In all these cases the companies had proved abortive and unable to commence business, but there were liabilities to be provided against or assets to be shared. In the last of them the directors would not produce any accounts.

Bastenne Bitumen Company, 3 De G. & Sm. 265.

A suit for a dissolution was pending. The circumstances which induced the Court to make a winding-up order are not stated. It could not have done so as a matter of course. See *Ex parte Phillips*, 1 Sim. N. S. 605, *infra*, p. 1240.

Ex parte Walker and Ex parte Troutbeck, 1 De G. & Sm. 185; affirmed 1 H. & T. 100, and 13 Jur. 157.

The company had no outstanding debts, but it had stopped business; a suit for its dissolution was pending, and some of its members had been compelled to pay much more than their proper share of debts.

Sherwood Loan Co., 1 Sim. N. S. 165.

St. George's Building Society, 4 Drew. 154.

Friendly societies which could not go on, and the rights of whose members could not be adjusted without a winding up.

Electric Telegraph Company of Ireland, 22 Beav. 471.

The company had spent all its capital, and could not go on without more.

Norwich Yarn Company, 12 Beav. 366.

The company was insolvent, and daily getting worse, but better times were hoped for.

Wey and Arun Junction Canal Co., 2 Weekly N. 100.
 Canal company ruined by railway competition.

Company amalgamated with another (b).

Ex parte Phillips, 3 De G. & S. 3.

Ex parte Dee, ib. 112.

Pennant and Craigwen, &c., Mining Co., 15 Jur. 1192.

In each of these cases a company had ceased to carry on business, and had been amalgamated with another company. In *Ex parte Phillips* the company's assets exceeded its liabilities, and there was a surplus to divide; in *Ex parte Dee* it was objected that in consequence of outstanding policies, the company's liabilities could not be settled for many years; in the *Pennant and Craigwen Co.* creditors were suing the shareholders.

Ex parte Lawton, 1 K. & J. 204.

The company had failed; its liabilities were outstanding; but a new company had been formed by all the shareholders of the first, save the petitioner and another. It was sworn that the affairs of the old company would speedily be wound up if no order were made. The petitioner alone desired the Court to interfere, and he, not having paid his calls, was sued by a creditor at the instance of the company. The order in this case was made on the ground that the company in question existed only for the purpose of winding up its affairs, that its assets were outstanding, and its liabilities undischarged.

2. PETITION DISMISSED.

A. Creditors' petitions.

Catholic Publishing Co., 2 De G. J. & Sm. 116.

Petitioner's debt disputed—twenty-one days after demand had not expired when petition was presented.

London Wharfing and Warehousing Co., 35 Beav. 37.

Petitioner's debt disputed—twenty-one days after demand had elapsed before petition was presented.

Hope Mutual Life Assurance Co., 1 New Rep. 542, and 11 Ho. Lo. Ca. 389.

Petitioner's debt, a judgment debt, disputed on ground of fraud, and he declined to try its validity.

European Banking Co., 1 Weekly N. 254.

Petitioner's debt small, and attached by judgment creditor of his own.

B. Contributories' petitions.

a) Company not insolvent.

Ex parte Wyld, 1 Mac. & G. 1, ante, p. 1230.

Company solvent, and carrying on business; petitioner would not pay his calls, and was sued by a creditor at the instigation of the directors.

(b) For other cases of amalgamated companies, see next page.

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Analysis of cases.

1. Order made.

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Analysis of cases.
2. Petition dismissed.

Ex parte Spackman, 1 Mac. & G. 170, *ante*, p. 1226.

Company solvent, and carrying on business. Petitioner was dissatisfied with an arrangement by which several shareholders had retired. This arrangement was subsequently held to be *ultra vires* (a).

National Provincial Live Stock Insurance Co., 26 Beav. 153.

The company was carrying on its business. It was alleged to be insolvent, and would have been so, if it could not have recovered monies due to it from its own directors and others for calls. But it was in a position to recover such monies, and was solvent when credited with them.

Ex parte James, 1 Sim. N. S. 140.

A member of the managing committee of an abortive company petitioned to have it wound up. There were no *bonâ fide* debts outstanding; the real object of the petitioner was to obtain payment of his brother's bill of costs, which was disputed, and for which an action had been brought and discontinued.

Anglo-Greek Steam Co., L. R. 2 Eq. 1, *ante*, p. 1227.

Misconduct on part of managers and directors alleged, but no insolvency, and no reason why business should not be profitable with better management.

Hop and Malt Exchange Co., 1 Weekly N. 222.

Company not a year old, and not in debt; members about equally divided as to whether they should go on or not, and articles providing that four-fifths must concur in order to pass a resolution to dissolve.

Factage Parisien Co., 10 Jur. N. S. 121.

Company not prospering, but not insolvent, and majority desirous of going on.

Metropolitan Saloon Omnibus Co., 5 Jur. N. S. 922.

Similar circumstances. Petitioner the nominee of a rival company.

Ex parte Fisher, 3 De G. & Sm. 116.

A subscriber for shares in a proposed railway company, petitioned to wind up a company formed for making and working portion only of the line originally contemplated. The projectors were authorised to apply for an act to enable the company to make a less line than that first intended.

b) *Company amalgamated with another.*

National Finance Co., 1 Weekly N. 243.

No circumstances requiring a winding up.

Anglo-Australian Assurance Co., 1 Dr. & Sm. 113.

The company's business had been transferred to another company, and the petitioner had become a shareholder in it, and was bound by the transfer. The amalgamation, however, was disputed, and the selling company was being sued for its debts.

(a) See *Stanhope's case*, L. R. 1 Ch. App. 161.

Ex parte Cookson, 15 Jur. 615.

A projected company had been amalgamated with another company, which had undertaken to buy up the scheme of the first. There were no debts of the former company outstanding or unsettled, but the money agreed to be paid was still unpaid. The sole object of the petition was to have this money got in and divided.

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 Div. 1. Sect. 4.

Analysis of cases.
 2. Petition dismissed.

c) *Company being wound up voluntarily.*

London Mercantile Discount Co., L. R. 1 Eq. 277.

Directors charged with breaches of trust, and commanding a majority of votes.

Imperial Mercantile Credit Association (Doyle's petition), 1 Weekly N. 257.

Great majority of contributories and of creditors adverse to a compulsory order.

General International Agency Co., 5 New R. 165.

Majority in favour of voluntary winding up.

St. David's Gold Mining Co., 1 Weekly N. 196.

Charges made against the liquidators, but no sufficient grounds to interfere with them.

Ex parte Watson, 3 De G. & Sm. 253.

The company had carried on business as bankers in India and in this country, and was being wound up extra-judicially. The petition was presented by a shareholder, who, declining to pay the amount required of him, was sued by a creditor.

Ex parte Guest, 5 De G. & Sm. 458.

The company was being wound up in a way approved by a majority of the shareholders. There was a large judgment debt to provide for, but the creditor was not pressing for payment.

Ex parte Wise, 1 Drew. 465, *ante*, p. 1230.

This was a somewhat similar case to the last, and the real object of the petitioner was to make the directors account to the company for a misapplication of its assets.

d) *Company small, and better wound up out of court than in.*

Natal, &c., Co., 1 Hem. & M. 639.

Sea, River, and Marine Insurance Co., 1 Weekly N. 253.

Companies having only nine and seven members respectively, no debts, and no reason why they should not be wound up voluntarily. In both cases the company desired to wind up voluntarily.

e) *Winding-up order useless if made.*

Ex parte Inderwick, 3 De G. & Sm. 231.

The petitioner was a subscriber to an abortive company. There were no outstanding liabilities, and no assets except what might be recovered from the promoters in respect of matters which

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Div. 1. Sect. 4.

Analysis of cases.

2. Petition dismissed.

occurred five years before, and which had been already made the subject of two compromises.

Ex parte Murrell, 3 De G. & Sm. 4.

The petitioner was a subscriber to an abortive company, but it appeared that there were no outstanding liabilities, and no assets except what could be got by opening accounts which had been long acquiesced in and acted upon. The petitioner had received back the greater part of his subscriptions. Compare *Ex parte Pocock*, 1 De G. & S. 731; *Ex parte Williams*, 1 Sim. N. S. 57.

Ex parte Phillips, 1 Sim. N. S. 605.

Suit for dissolution pending, in which everything could be done. Compare *Bastenne Bitumen Co.*, 3 De G. & S. 265, *ante*, p. 1236.

3. PETITION ORDERED TO STAND OVER.

A. Creditors' petitions.

Rhydydefed Colliery Co., 3 De G. & J. 80.

Petitioner's debt disputed.

Inventor's Association, 2 Dr. & Sm. 553.

Petitioner's debt disputed—voluntary winding up proceeding—action against company commenced by petitioner, but obstructed by liquidator.

B. Contributories' petitions.

Imperial Bank of China, L. R. 1 Ch. App. 339.

Resolution to wind up voluntarily, in order to amalgamate with another company. Petition impeached whole proceeding, and was ordered to stand over, with liberty to file a bill.

British Provident Association Society, 1 Dr. & Sm. 113.

The company had transferred its business to another company, which was not shown to be unable or unwilling to fulfil its engagements.

Wheal Anne Mining Co., 30 Beav. 601.

The petition was ordered to stand over with a view to an arrangement being made. Creditors were suing in the Stannary Courts.

North Western Trunk Co., 3 De G. & Sm. 266.

The company had proved abortive, but it was not clear that anything capable of being wound up had really ever existed.

Ex parte Williams, 1 Sim. N. S. 57.

The company was abortive, and had, in fact, had its affairs wound up, but, as the petitioners alleged, in an improper manner. Compare *Ex parte Pocock*, 1 De G. & S. 731; *Ex parte Murrell*, 3 ib. 4; *Larne, Belfast, &c., Rail. Co.*, 14 Jur. 996.

Monmouthshire and Glamorganshire Banking Co., 15 Beav. 74.

The petition was ordered to stand over, to enable the company, if possible, to wind up its own affairs, which it had begun to do.

Ex parte Collins, 8 W. R. 170.

The petition was ordered to stand over with liberty to apply; the solvency of the company depending on its right to enforce a disputed contract for the sale of its business to another company.

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 Div. 1. Sect. 4.

Analysis of cases.

3. Petition
 ordered to stand
 over.

Ex parte Pocock, 1 De G. & Sm. 731.

The company proved abortive. The great majority of the subscribers had been repaid part of the money they had paid for deposits, and had released the directors. A dissatisfied subscriber, who had not executed the release, presented a petition for winding up the company, alleging a refusal by the directors to produce the accounts, and a misapplication of assets by them. The Court declined to order the company to be wound up; it also declined to direct any inquiry as to the expediency of winding it up; at the same time it would not dismiss the petition, but ordered it to stand over, so that the petitioner might have an opportunity of seeing the accounts which had been withheld from him. What ultimately became of the petition does not appear. See, too, *Ex parte Capper*, 3 De G. & S. 1; and compare *Ex parte Murrell*, ib. 4. In *The Larne, Belfast, &c., Rail. Co.*, 14 Jur. 996, the directors refused to produce the accounts, and a winding-up order was therefore made.

Bosworthon Mining Co., 26 L. J. Ch. 612, M. R.

Inquiries were directed by consent, in order to see whether the petitioner, who was being sued by a creditor, had paid more than he owed to the company. A winding-up order was ultimately made.

Ex parte Moss, 14 Jur. 754.

An inquiry was directed to ascertain the position of the company abroad, it being half a foreign and half an English company.

SECTION V.

Proceedings to obtain a winding-up order, and to discharge it, and to stay proceedings under it.

The proper mode of applying to the Court for a winding-up order, whether by the Court or subject to the supervision of the Court, is by petition (c).

Petition for
 winding-up
 order.

No form of petition is given, but it must be entitled in the matter of the Companies act, 1862, and of the company sought to be wound up (Rule 1). The petition should show the

Form of petition.

(c) 25 & 26 Vict. c. 89, §§ 82 and 148.

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nature of the company, the title of the petitioner to present the petition, and the circumstances on which he relies for obtaining the order; the petition should state such circumstances in sufficient detail to enable the Court to see from the petition itself that a winding-up order ought to be made, if the statements in the petition are not denied or satisfactorily explained by those who opposed it (*d*).

Advertisements.

Every contributory or creditor is entitled to have a copy of the petition, on payment of 4*d.* per folio (Rule 5).

The petition must be advertised seven clear days before the hearing, once in the *London Gazette*, and once at least in two London daily morning newspapers, or local newspapers, according to the situation of the company's office (Rule 2).

The advertisement must state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (Rule 2). Forms of advertisement are given in the schedule to the rules (*e*).

Care should be taken to make no mistakes in advertising. An advertisement that a petition will be heard on Saturday the 20th of December, when the 20th fell on a Thursday, has been held insufficient (*f*).

In a case where a petition came on to be heard too soon, it was ordered to stand over in order that fresh advertisements might be issued (*g*). The petition may be presented and the advertisements issued on the same day: and where an advertisement stated that a petition had that day been presented; and the petition was presented on that day, but not until after the advertisement had been published, the Court held the advertisement sufficient (*h*).

(*d*) For a form of petition, see 2 Smith's Chanc. Prac. 319, 7th ed.; and for a form under the older acts, see *Re North of England Banking Co.*, 1 De G. & S. 545.

(*e*) For the form of advertisement, see rule 2 and form 1 in the 3rd schedule to the rules.

(*f*) *Re the Joint-Stock Companies Winding-up Act*, 13 Beav. 434.

(*g*) *London and Westminster Wine Co.*, 1 Hem. & M. 561. Under the

older acts, it was held that the advertisement of the petition in the *London Gazette* need not be seven days before the hearing of the petition, although the advertisements in the other papers must (*English and Irish Church and University Assurance Society*, 10 W. R. 33, V.-C. W.). It is, however, different now.

(*h*) *Cork and Youghal Rail. Co.*, 1 Weekly N. 279, R.

The petition, unless presented by the company itself, must be served at its registered office (*i*), and if there is no such office, then at the company's principal or last known principal place of business, if any can be found; and the service must be upon some member, officer, or servant (*k*) of the company there; or if no such person can be found there, then by being left at the registered office or principal place of business of the company (*l*). If it is found impracticable to comply with these directions, application must be made to the Court for leave to serve the petition upon some member of the company (*m*). Where a company is being wound up voluntarily, a petition to have it wound up subject to the supervision of the Court must be served on the liquidators (*n*); but, owing probably to an oversight, the rules do not require that the liquidators should be served with a petition to have the company wound up compulsorily. This, however, ought, it is conceived, to be done.

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Div. 1. Sect. 5.

Service of
petition.

Where a company's registered office was shut up, the Court directed the petition to be dropped into the letter-box of the office, and to be served on the company's solicitor, and on one of the directors (*o*). In another case, where the company was being wound up voluntarily, service was directed on all the directors and two or three of the principal shareholders (*p*).

The petition must be verified by the affidavit of the petitioner, or one of the petitioners; or, if the company is the petitioner, by some director, secretary, or principal officer (*q*).

Evidence in sup-
port of petition.

(*i*) As to which, see the Companies act, 1862, §§ 39, 40, and 211.

(*k*) These words occurred in 11 & 12 Vict. c. 45, § 10, and it was held that service on a member of the provisional committee was insufficient, *Re London and Dublin, &c., Railway Company*, 3 De G. & S. 208; so service on the company's solicitor, *Ex parte Dale*, ib. 11.

(*l*) Rule 3.

(*m*) Ib. Service on some member seems necessary. Under 11 & 12 Vict. c. 45, § 10, service might

be dispensed with altogether. As to whether service can be dispensed with by consent, see *Re Brighton, Lewes, &c., Rail. Co.*, 1 De G. & S. 604; *Ex parte Wolesey*, 3 ib. 101; *Re Tring, Reading, &c., Rail. Co.*, ib. 10.

(*n*) Rule 3.

(*o*) *London and Westminster Wine Co.*, 1 Hem. & M. 561.

(*p*) *Inventors' Assoc.*, 6 New Rep. 349, V.-C. K.

(*q*) Rule 4. A form of affidavit is given, see form 2 in the 3rd schedule to the rules.

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If one company petitions for an order to wind up another, an affidavit by the secretary or one of the acting directors of the petitioning company would probably be sufficient. The affidavit must be sworn and filed within four days after the petition is presented (*r*); but the time will be enlarged by the Court if any reasonable grounds for so doing are shown (*s*).

Appearance in
support and op-
position.

There does not appear to be any settled rule as to who is or is not entitled to appear upon the petition, and to support or oppose it. The question is practically material only as regards costs: and with respect to them the following rules are usually followed:

Costs.

1. The costs of a petition on which a winding-up order is made are borne by the company (*t*); these costs include the costs of the petitioner and of the company, and the costs of all other persons, if any, properly served with the petition (*u*).

2. The costs of a petition which is dismissed are borne by the petitioner, unless the Court is of opinion that the petition was justifiable, in which case the dismissal will be without costs. If dismissed with costs, such costs include those of the company, and of all persons, if any served with the petition (*x*).

3. With respect to persons who appear to support or oppose a petition, although not served with it, there is, unfortunately, no settled rule. It was laid down by the Master of the Rolls in the case of *The Humber Iron Works Company* (*y*), 1, that if a winding-up order is made, one set of costs payable by the company will be allowed between those who (without being served) support the petition, no costs being allowed to those who oppose it; 2, that if an order is not made, no person (not served) will, as a general rule, be allowed his costs, whether he supports or opposes the petition; but, 3, that if the

(*r*) Rule 4.

(*s*) See rule 73; *Patent Screwed Boot Co.*, 32 Beav. 142; *Kentish Royal Hotel Co.*, 5 New Rep. 423, R.

(*t*) The order is usually silent as to the costs. It was so under the older acts, see the form in 1 De G. & Sm. 547.

(*u*) *Humber Iron Works Co.*, L.

R. 2 Eq. 15; *Oriental Commercial Bank*, 1 Weekly N. 283.

(*x*) *Humber Iron Works Co.*, L. R. 2 Eq. 15; *Hop and Malt Exchange Co.*, 1 Weekly N. 222, V.-C. W.

(*y*) L. R. 2 Eq. 15. See, also, *Anglo-Greek Steam Co.*, ib. 1. See, also, *Merchants' Co.*, 1 Weekly N. 339.

petition contains statements prejudicially affecting any person individually, such person is entitled to appear and answer them, and if the statements are not substantiated will be entitled to his costs from the petitioner. The distinction however drawn in the above case between petitions on which winding-up orders are made and those on which they are refused, has not been altogether approved; and in the case of the *European Banking Company* (z), the V.-C. Kindersley in dismissing a petition ordered the petitioner to pay not only the costs of the company, and the costs of provisional liquidators, but also one set of costs for members who appeared and opposed without being served; and his Honour intimated that if any creditors had appeared to oppose they also would have had one set of costs between them. In another case (a), where a petition had been presented and advertised, and was then withdrawn without having been served at all, the same eminent judge ordered the petitioner to pay the costs of the company and of those shareholders who before notice of withdrawal had incurred expense in preparing to oppose the petition (b). The V.-C. Wood, on the other hand, has refused to give costs to persons not served, as well when a winding-up order has been made (c), as when it has been refused (d); and this, the writer ventures to suggest, is the most desirable rule to enforce.

It need hardly be added that a person who appears to support an unsuccessful, or oppose a successful petition, cannot be entitled to costs (e).

A provisional liquidator is only in the nature of a receiver, and will not be allowed his costs of appearing on a winding-up petition (f).

Where a petition was presented by a shareholder in a cost-book mining company, who had been sued by a creditor, and the petition was opposed on the ground that the petitioner was

Costs of preliminary inquiries.

(z) 1 Weekly N. 254.

(a) *Marlborough Club Co.*, L. R. 1 Eq. 216.

(b) *Ib.*

(c) *Oriental Commercial Bank*, 1 Weekly N. 283, only the persons served got their costs.

(d) *Hop and Malt Exchange Co.*, 1 Weekly N. 222; *Imperial Merc. Credit Ass.*, *ib.* 256.

(e) *London and Mediterranean Bank*, 1 Weekly N. 207.

(f) *General International Agency Co.*, 5 New Rep. 265.

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Div. 1. Sect. 5.

indebted to the company, and had not been compelled to pay more than he owed to the company, and an inquiry upon that point was directed by consent, and the result showed that the petitioner had paid more than he owed the company, and a winding-up order was then made, the costs of the preliminary inquiries were thrown on those whose opposition caused them to be directed (g).

Several petitions.

There is nothing to prevent the presentation of several petitions by several persons; and as no person can prevent the withdrawal of a petition presented by another person, and as petitions are frequently presented in order that they may be withdrawn or pressed on as may be afterwards found convenient, it has become common for several persons to present several petitions to wind up the same company. This practice, however, is discouraged as much as possible by the courts; and persons who, without some special justification, present petitions after they know that a petition has been presented already, run great risk of having to pay the costs incurred by themselves, if not also the costs of the persons they have served (h). Where, however, the first petition is presented by persons in the interest of the company and is of a suspicious character, a second petition is considered justifiable (i); and where there are several justifiable petitions and a winding-up order is made, one order is usually made on all the petitions, and the costs of them all are paid by the company (j); one set of costs being allowed to the unserved creditors and one to the unserved contributories appearing and supporting the petitions (k).

Security for costs.

If a petition is presented by a limited company (l), or by a person resident out of the jurisdiction, the petitioner can be

(g) *Re Bosworthon Mining Co.*, 26 L. J. Ch. 612, M. R. 2 Eq. 15; *Commercial Discount Co.*, 1 New Rep. 416.

(h) See, on this subject, *Ex parte Turner*, 3 De G. & S. 127; *Times Fire Ins. Co.*, 30 Beav. 596; *Imperial Mercantile Credit Association*, 1 Weekly N. 256; *Oriental Commercial Bank*, ib. 283, and the cases in the next note. (j) See the cases in the last two notes, and *Ex parte Walker*, 1 De G. & Sm. 585.

(k) *Ante*, p. 1244, and *Merchants' Co.*, 1 Weekly N. 339.

(l) See the Companies act, 1862, § 69.

(i) *Humber Iron Works Co.*, L. R.

compelled to give security for costs before his petition is heard; and such security can be applied for, either when the petition comes on for hearing (*m*) or before (*n*). Bk. IV. Chap. 3.
Div. 1. Sect. 5.

Appeals from and staying proceedings under winding-up orders.

A winding-up order made by a court having no jurisdiction to make it, is wholly invalid, and must be so treated although not appealed against (*o*); but an order made by a court having jurisdiction must be treated as valid until reversed on appeal (*p*). Under the older winding-up acts, if an order were made upon the petition of a person not entitled to petition, the order was not void; but it, and all proceedings under it, were allowed to stand, and its further prosecution was, upon a proper application to the court, entrusted to a qualified person (*q*). There is no express provision to this effect in the Companies act, 1862, but the old winding-up practice is so continued that probably the above rule would still be observed (*r*). Improper orders.

After an order for the winding up of a company has been made, such order may be appealed from in the ordinary way (*s*); but if no caveat is entered, there is nothing to prevent the person who has obtained the order from enrolling it, so as to prevent an appeal except to the House of Lords (*t*). An appeal from a winding-up order need not be made within three weeks after the making of the order complained of (*u*). It does not follow that because the order is appealed against, Appeal from
the winding-up
order.

(*m*) *Ex parte Seidler*, 12 Sim. 106.

(*n*) *Atkins v. Cooke*, 3 Drew. 694.

(*o*) *Plumstead Water Co. v. Davis*, 28 Beav. 545, and 2 De G. F. & J. 20.

(*p*) *Oake's and Peek's cases*, 2 Weekly N. 101.

(*q*) 11 & 12 Vict. c. 45, § 9.

(*r*) See the Companies act, 1862, §§ 82, 170.

(*s*) 25 & 26 Vict. c. 89, § 124. A company unsuccessfully appealing

was allowed its costs out of its own estate in *National Savings Bank Association*, L. R. 1 Ch. App. 554.

(*t*) See *Re Direct London and Exeter Rail. Co.*, 1 Mac. & G. 534.

(*u*) *Re Universal Bank*, L. R. 1 Ch. App. 428. So, under the old practice, see *Anglo-Californian Rail. Co.*, 1 Dr. & Sm. 628; *Plumstead Water Co.*, 2 De G. F. & J. 20.

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Div. 1. Sect. 5.

Discharge of
order.

proceedings under it will be stayed until the appeal is disposed of (*x*).

Without, however, any appeal, a winding-up order will, on motion or petition (*y*), be discharged by the judge who made it, if it was obtained by the concealment or misrepresentation of any material facts; and if those facts were known to the person who obtained the order, he will be compelled to pay the costs of the application to discharge it (*z*). But an order will not be discharged unless the Court is applied to as speedily as possible after the grounds for discharge have become known (*a*). If proceedings have been taken under a winding-up order, and expense has been incurred, and the order is discharged upon the ground that it was improperly obtained by the petitioner, he could, probably, be made to pay all the costs (*b*); but where a winding-up order had been made and acted on for more than a year, and an application to discharge it was then made upon grounds known to exist from the very first, the application was refused with costs, as the applicant declined to indemnify the official manager against the costs which had been incurred in the winding up (*c*).

Staying proceedings under order.

An application to discharge an order is, strictly speaking, only proper when the order in question ought never to have been made. But cases may occur in which a winding-up order has been rightly made, but in which its further prosecution is not desirable. In such a case, application should be made to the Court which made the order, to stay the proceedings under it. This the Court has power to do on the application of any creditor or contributory (*d*); and the Court will accede to the application if it is satisfied that it is not for the advantage of the company, or of any of the persons interested in its

(*x*) *Ex parte Barber*, 1 Mac. & G. 183. ing S. C., 5 De G. & S. 117.

(*y*) See *Clarke's case*, 1 K. & J. 22.

(*z*) *Ex parte Barnett*, 1 De G. & S. 744; *Ex parte Coleman*, 3 ib. 139.

(*a*) *Chepstow, Gloucester, &c., Rail. Co.*, 2 Sim. N. S. 11; *Clarke's case*, 1 K. & J. 22; *Ex parte Woolmer*, 2 De G. Mac. & G. 665, affirm-

(*b*) See *Ex parte Barnett*, 1 De G. & S. 744.

(*c*) *Clarke's case*, 1 K. & J. 22.

(*d*) See § 89 of the Companies act, 1862. A person applying as an alleged contributory must admit himself to be a contributory. See *Continental Bank*, 2 W. N. 114.

winding up, that further proceedings should be taken (e). Thus in the case of *The Worcester, Tenbury, and Ludlow Railway Company* (f), a winding-up order had been made, an official manager had been appointed, all the company's debts had been paid, and a surplus remained. It had been found impossible to make out a complete list of contributories, as the allottees of a considerable number of shares could not be discovered, but the known allottees held the great bulk of the shares which had been issued. Upon their petition the Court ordered the fund in court to be paid to them, they undertaking to deal with it as the Court should direct, and to pay the costs incurred in the winding up.

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Div. 1. Sect. 5.

Worcester, Ten-
bury, &c., Rail-
way Company.

But a winding-up order is in the nature of a decree made for the benefit as well of creditors as of contributories (g); and proceedings under it cannot be stayed without giving those who have acquired rights consequent upon it an opportunity of opposing the application to stay proceedings (h). Consequently, an order to stay proceedings will not be made, unless the contributories, and the creditors who have proved their debts, have had proper notice of the intention to apply for the order; and such an order will not, therefore, be made upon notice of a motion to discharge a call (i), or to be struck off the list of contributories (k).

Winding-up
order in the
nature of a
decree.

Again, where an order has been obtained and acted on, and costs have been incurred under it, these costs must be provided for by those who seek to have further proceedings stayed (l).

Costs to be pro-
vided for on
staying proceed-
ings.

(e) In *Ex parte Barber*, 1 Mac. & G. 183, proceedings pending an appeal were not stayed.

(f) 3 De G. & S. 189.

(g) See § 82 of the Companies act, 1862.

(h) See *Carew's case*, 5 De G. Mac. & G. 94; *Underwood's case*, ib. 677; *Clifton's case*, ib. 743. As to serving the provisional liquida-

tor, see *Ex parte Coleman*, 3 De G. & S. 139.

(i) *Carew's case*, 5 De G. Mac. & G. 94, reversing S. C., 2 Sm. & G. 1.

(k) *Underwood's case*, 5 De G. Mac. & G. 677; *Sharpus's case*, 3 De G. & S. 49.

(l) *Clarke's case*, 1 K. & J. 22; *Ex parte Woolmer*, 5 De G. & S. 117, and 2 De G. Mac. & G. 665.

SECTION VI.—EFFECT OF WINDING UP AS REGARDS DEALINGS WITH PROPERTY.

1. *Commencement of winding up.*Bk. IV. Chap. 3.
Div. 1. Sect. 6.

1. Compulsorily.

When a petition is presented to wind up a company by the Court, the commencement of the winding up dates from the presentation of the petition (*m*). Hence the importance, when there are several petitions, of making a winding-up order, if possible, on that first presented. But if the petition is dismissed, the winding up commenced on its presentation will obviously be at an end.

2. Voluntarily.

When a resolution has been passed to wind up a company voluntarily, the voluntary winding up dates from the passing of the resolution (*n*). But if the company is afterwards ordered to be wound up compulsorily, the commencement of the winding up will date from the time of the presentation of the petition on which the order is made (*o*). This is sometimes a good reason for not making such an order when a company has been for some time winding up voluntarily.

3. Subject to supervision.

An order to wind up a company subject to the supervision of the Court pre-supposes a prior resolution to wind up voluntarily, and in fact continues the voluntary winding up. The commencement, therefore, of a winding up subject to supervision must, it is conceived, date from the passing of the resolution to wind up voluntarily, and not from the time of the presentation of the petition on which the order is made (*p*).

Importance of
the commence-
ment of wind-
ing up.

The exact time of the commencement of the winding up of a company is important, inasmuch as after that time great restrictions are put on all dealings with the property of the company, on all alterations in the status of its members, and on all proceedings by creditors to enforce payment of their debts. The leading principle pervading the winding-up provisions of the Companies act, 1862, is that nothing shall be done

(*m*) § 84.(*n*) § 130.(*o*) § 84.

(*p*) §§ 148, 151, and 164, make this a little uncertain: but it could hardly be the intention of the legislature that such an order should shift the commencement of the

winding up to a period subsequent to the resolution, and thereby render valid transfers of shares and other transactions which would have been impeachable if the commencement of the winding up dated from the resolution.

after the commencement of the winding up of a company except with a view to realise its assets and distribute them rateably first amongst its creditors, and then, if there is a surplus, amongst its members (*q*). Bk. IV. Chap. 3.
Div. 1. Sect. 6.

2. *Effect of winding up on dealings with property.*

A petition to wind up a company compulsorily constitutes a *lis pendens* if registered under 2 & 3 Vict. c. 11 (*r*). But there does not appear to be any power to register either a resolution to wind up voluntarily, or a petition to wind up subject to supervision (*s*), so as to constitute such resolution or petition a *lis pendens* under the same act. Lis pendens.

A petition can only be properly registered as a *lis pendens* against the company, and does not affect the separate property of its members (*t*). If registered against a member individually, the Court will order the registration against him to be vacated (*u*).

Again, when an order has been made to wind up a company compulsorily, or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company made subsequently to the commencement of the winding up of the company are void unless confirmed by the Court (*x*). The winding-up order has thus a retrospective effect; and apparently even renders void all dispositions of property made previously to the order by voluntary liquidators unless the Court expressly sanctions them (*y*). After a winding-up order has been made, no disposition of the company's property is valid unless made by the liquidators or the Court (*z*). Retrospective
effect of order to
wind up.

After a resolution to wind up voluntarily, no disposition of a company's property can, it is apprehended, be made, except by the liquidators (*a*).

(*q*) This will be seen by examining the following sections, 85, 87, 95, 98, 102, 107, 109, 133, 153, 158, 163, 164, and 196 to 204.

(*r*) See Companies, act, 1862, § 114.

(*s*) Quære if §§ 148, 151, and 164, authorise the registration of such a petition as a *lis pendens*.

(*t*) *Ex parte Thornton*, L. R. 2 Ch. App. 171. See *ante*, p. 536.

(*u*) *Ibid*.

(*x*) § 153.

(*y*) See, also, § 151. But quære if this is the true construction.

(*z*) See §§ 92 and 95.

(*a*) See §§ 131 and 133.

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Fraudulent preference.

Where a company is being wound up, whether by the Court, or subject to its supervision, or voluntarily, the doctrines of fraudulent preference are applicable to it; and with reference to these doctrines, the presentation of the petition in the first two cases, and the resolution to wind up in the last case, is equivalent to an act of bankruptcy (*b*).

Creditor's deeds.

All conveyances or assignments by a company formed under the act of 1862 to trustees, for the benefit of all its creditors, are wholly void (*c*).

Transfers of shares.

The effect of the commencement of the winding up of a company on transfers of shares will be examined hereafter under the head contributories.

3. *Effect of winding up on actions and suits against the company and its members.*

a) Old law.

No part of the law relating to the winding up of companies has been more altered or improved than that which relates to the rights of creditors to enforce payment of their debts by ordinary legal proceedings (*d*). Under the Winding-up acts of 1848 and 1849 it was held (*e*)—

Acts of 1848
and 1849.

1. That a winding-up order *per se* did not prevent a creditor of the company from obtaining and executing judgments against it or its members (*f*).

2. That a winding-up order, and the appointment of an interim manager, did not preclude a creditor from obtaining judgment against the company or its members, or from enforcing a judgment against the latter; but merely precluded

(*b*) § 164.

(*c*) Ibid.

(*d*) See *ante*, p. 1213.

(*e*) The statements in the text apply to the creditors suing in the ordinary courts of law. Creditors suing in the Stannary Courts were in a much worse position, for their proceedings were stayed by the mere presentation to the Court of Chancery of a petition for winding up, and notice thereof to the Vice-

Warden. See 12 & 13 Vict. c. 108, § 1, and 20 & 21 Vict. c. 78, §§ 12 and 13. It was, however, decided that a creditor was not entitled to appear and oppose the petition, *Trefoil and Messer Mining Co.*, 2 J. & H. 421.

(*f*) *Re India and Australia Steam Packet Co.*, 17 Sim. 15; *Hill v. London and County Association Society*, 1 H. & N. 398; *Re Phillips*, 18 Beav. 629.

the judgment creditor from intermeddling with the property of the company protected by the interim manager (g). Bk. IV. Chap. 3.
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3. That after a winding-up order, and the appointment of an official manager, proceedings by a creditor of the company against the company or its members would be stayed until the creditor had, so far as he was able, proved his debt in the winding up (h).

4. That this last rule did not apply to persons in a position to sue one or more individuals by virtue of some contract binding on them, otherwise than as members of the company, *e.g.*, upon some separate undertaking or promissory note, on which they were personally liable (i).

5. That a creditor of the company who had, so far as he was able (k), proved his debt in the winding up, was at liberty to proceed to enforce his demand against the company or its members without further hindrance or delay, save that he could not seize the property of the company vested in the official manager. Therefore, the Court of Chancery would not restrain such creditor from issuing execution against a contributory (l); nor would a court of law withhold from a judgment creditor of the company permission to enforce payment of his debt from the individuals liable to pay it (m); nor was there anything to prevent such a creditor from suing the official manager for the purpose of obtaining a judgment, decree, or order against him (n), or from afterwards enforcing

(g) *Brettell v. Dawes*, 7 Ex. 307.

(h) *Hutchinson v. Harding*, 11 Ex. 561; *Thompson v. Universal Salvage Co.*, 3 Ex. 310; *McGregor v. Keiley*, 4 Ex. 801; *Prescott v. Hadow*, 5 Ex. 726; *Marson v. Lund*, 13 Q. B. 664. But non proof in the winding up was no defence to an action, *McKenzie v. Sligo, &c., Rail. Co.*, 18 Q. B. 862.

(i) *Re Sudlow and Kingdom*, 12 Beav. 527; *Penkivil v. Connell*, 5 Ex. 381; *Beardshaw v. Londesborough*, 11 C. B. 498. See, too, *McGregor v. Keiley*, 4 Ex. 801; *Dover and Deal Rail. Co.*, 17 Sim. 18.

(k) An unsatisfactory affidavit of

debt is not sufficient proof, *Hutchinson v. Harding*, 11 Ex. 561.

(l) *Re Dover and Deal Rail. Co.*, 17 Sim. 18; *Re Phillips*, 18 Beav. 629; *Prichard's case*, 5 De G. Mac. & G. 484.

(m) *Morisse v. Royal Brit. Bank*, 1 C. B. N. S. 67; *Palmer v. Justice Association Society*, 6 E. & B. 1015; *Hill v. London and County Assoc. Society*, 1 H. & N. 398; *Carroll v. Kennedy*, 6 Ir. Com. Law Rep. 11; *Mackenzie v. Sligo, &c., Rail. Co.*, 4 E. & B. 119.

(n) *Robson v. McCreight*, 25 Beav. 272; *Thompson v. Norris*, 5 De G. & S. 686.

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Alteration made
by 20 & 21 Vict.
c. 78.

When leave to
sue was re-
quired.

b) Under the
Companies act,
1862.

such judgment, decree, or order against the individuals represented by him (o).

By 20 & 21 Vict. c. 78, however, these rights of the creditors of a company which was being wound up under the acts of 1848 and 1849, were materially altered. For in the first place, the Master or Judge acting in the winding up was empowered to call upon the creditors, by advertisement, to meet and choose one or more persons, other than the official manager, to represent them in the winding up; and after they had been thus called upon by advertisement, the creditors became parties to the winding up (p).

In the next place, as soon as the creditors had chosen, or had been required to choose representatives, no action or suit could be either commenced or prosecuted by any creditor against the official manager or the company, or any other person representing the same, or any person as a contributory thereof, except by leave of the master or judge acting in the winding up (q). It was not, however, incumbent on the Master or judge to require the creditors to choose a representative; and until they were required to do so, their right to sue was not affected (r).

The Companies act, 1862, proceeds upon an entirely different principle; the leading idea being that when the winding up of a company has once commenced, its creditors ought to be paid *pari passu* (s). In order to give effect to this principle the act enables the Court, when a company is being wound up either compulsorily or voluntarily (t), to stay actions, suits, and

(o) But a judgment against the official manager of a so-called company which has no capacity to sue or be sued, either by a corporate name or by a public officer, cannot be enforced against the individuals composing such company, *Re Weiss*, 15 C. B. 331.

(p) 20 & 21 Vict. c. 78, § 1. See *Mexican and South American Mining Co.*, 26 Beav. 172.

(q) *Ib.* § 7. Such leave was obtained in *Chambers*, *Royal British Bank*, 3 Jur. N. S. 1114; if not ob-

tained, the court in which the action was brought would stay proceedings, *Thomas v. Wells*, 16 C. B. N. S. 508. See, as to judgment creditors, *Barnes v. Thrupp*, 3 Jur. N. S. 1242.

(r) *Robson v. McCreight*, 25 Beav. 272. See, also, *Ex parte Tobin*, 7 W. R. 4.

(t) See §§ 85, 87, 138, 163.

(s) See *ante*, p. 1251, note (q), and *Ex parte Grissell*, L. R. 1, Ch. App. 528.

executions not only against companies which are being wound up, but also against their members in those cases in which such proceedings against them individually can still by law be taken.

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It has been already pointed out that the members of a company formed and registered under the Companies act, 1862, or under the former acts of 1856-8, are not liable to be proceeded against personally at law in respect of the debts of the company (*u*); but it may be otherwise as regards companies not formed under these acts; and it therefore becomes material for the present purpose to distinguish companies of the first class from those of the second.

a) As regards companies formed and registered under the act.

With respect to companies formed and registered under the Companies act, 1862, or under the repealed acts of 1856-8 (*x*), it is enacted that at any time after the presentation of the petition, and before any winding-up order is made upon it, the court may, upon the application of the company or any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company (*y*); and further, that after a winding-up order is made, no action, suit, or other proceeding shall, without leave of the Court, be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose (*z*). Moreover, where a company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution, put in force against the estate or effects of the company after the commencement of the winding up, is declared to be void to all intents (*a*). But notwithstanding these last words, the Court has power to allow such executions

1. Where company is being wound up by the court, or subject to supervision.

Restraining actions, &c.

(*u*) See *ante*, p. 532.

(*x*) See §§ 176 and 177 of the Companies act, 1862.

(*y*) Companies act, 1862, § 85.

(*z*) *Ib.* § 87. It seems that proceedings at law may be stayed by application to the court in which they are pending, see *Lanyon v.*

Smith, 3 Best. & Sm. 938. See, also, *Thomas v. Wells*, 16 C. B. N. S. 508, which, however, turned on 20 & 21 Vict. c. 78. Compare *Gray v. Raper*, L. R. 1 C. P. 694, as to industrial societies.

(*a*) *Ib.* § 163.

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Where company
is being wound
up voluntarily.

to proceed, at least where they have been commenced before the making of the winding-up order (*b*). It is, moreover, doubtful whether any of the sections in question apply to proceedings by the Crown (*c*).

There are no similar provisions expressly applicable to companies which are being wound up voluntarily; but upon the application of the liquidators or any of the contributories of such companies, the Court is empowered to restrain creditors from proceeding with actions, executions, &c., in like manner as it can where a company is being wound up by the Court (*d*); and this power has been exercised on several occasions, as will be seen presently (*e*). A creditor, however, is not apparently entitled to apply to the Court to interfere in these cases (*f*).

In exercising the powers thus conferred upon it the Court is much more reluctant to stay executions than other proceedings. To interfere with a creditor whose legal right is established, and who is about to reap the fruit of a successful litigation, is a strong measure scarcely to be justified by considerations of hardship to the debtor, but possibly justifiable on the principle that equality is equity, and that it is unjust to other creditors that one shall obtain payment in full whilst little or nothing is left for them. Even as between creditors, however, some preference is fairly the reward of extra diligence; and where a creditor has actually issued execution against a company before a petition to wind it up has been presented, and the sheriff is in possession when it is presented, the Court will not interfere and deprive the creditor of the fruits of his diligence (*g*), unless he is acting vexatiously in forcing on a sale to the detriment of the company, and without any corresponding advantage to himself (*h*). And even

(*b*) *Exhall Mining Co.*, 4 New R. 127, L. J.

(*c*) *English Joint Stock Bank*, 1 Weekly N. 199.

(*d*) § 138.

(*e*) Actions stayed, *Keynsham Co.*, 33 Beav. 123; *Life Assurance Co. of England*, 10 Jur. N. S. 762, M. R.; Execution stayed, *Sablionière*

Hotel Co., L. R. 3 Eq. 74.

(*f*) See § 138.

(*g*) *Great Ship Co.*, 3 New R. 181, L. J.

(*h*) See *Hill Pottery Co.*, L. R. 1 Eq. 649, where the sheriff had seized before the petition was presented.

after a winding-up order had been made, the Court allowed a distress commenced after the presentation of the petition, but previously to the order, to be continued (*i*). So it is presumed that an execution would be allowed to go under similar circumstances unless some special reason why it should not could be shown. After a winding-up order, however, the execution creditor should apply for leave to proceed: where he was proceeding without leave the Court interfered and stopped him (*k*).

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Where a resolution had been passed to wind up a company voluntarily, and an action was afterwards commenced against it, and judgment was recovered, execution was nevertheless stayed (*l*). This is as yet the only reported case in which execution has been stayed where a company was not being wound up by the Court, or under its supervision; but there can be no question as to the power of the Court to interfere in such cases (*m*).

When on the other hand the Court is asked to stay an action or suit, the only material question to be considered is, whether there are any circumstances which render it necessary that the action or suit should be continued, or whether the claim of the plaintiff is not one which can be as easily dealt with in the winding up as in any other way. If the claim sought to be enforced is capable of being satisfactorily dealt with in the winding up, other proceedings to enforce it will be stayed; but the costs already incurred by the creditor will be added to his debt (*n*). Even where a company is being wound up voluntarily, actions against it will be stayed upon these terms (*o*).

Staying actions
and other pro-
ceedings.

If the Court is of opinion that the action or suit ought not to be stopped, *e.g.*, where a suit is instituted against directors or other individuals as well as against the company, the Court will allow the proceedings to go on, but will require the

(*i*) *Exhall Mining Co.*, 4 New R. 127, L. J.

(*k*) *Waterloo Life Insurance Co.*, 31 Beav. 589. Compare the last case, which perhaps somewhat modifies this.

(*l*) *Sablionière Hotel Co.*, L. R. 3 Eq. 74.

(*m*) See the act, § 138, and on the construction of § 163, see *ante*, note (*b*).

(*n*) *Keynsham Co.*, 33 Beav. 123; *Life Assurance of England*, 10 Jur. N. S. 762, M. R.

(*o*) See the cases in the last note.

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plaintiff to undertake not to issue execution against the company without the leave of the Court (*p*).

Applications for leave to continue proceedings against a company which has been ordered to be wound up should be made to the judge who made the order (*q*); and should, it seems, be made by summons at chambers (*r*).

b) As regards companies not formed under the act.

The winding-up provisions of the Companies act, 1862, apply, as has been seen, not only to companies formed and registered under it, but also to other companies (*s*). As regards actions, suits, executions, &c., against companies themselves, it is not material to distinguish those formed under the act from other companies (*t*). But in the case of a company not formed under the act of 1862, or under the prior acts of 1856—1858, creditors of the company may be entitled to proceed against members individually; and accordingly the act of 1862 contains provisions enabling the Court, before any winding-up order is made, to stay such proceedings upon the application of any creditor both when the company has been registered (*u*) and when it has not (*x*): only a creditor, however, is entitled to apply for a stay of such proceedings (*y*). But after a winding-up order has been made, no action, suit, or other legal proceeding can be commenced or proceeded with against any contributory in respect of any debt of the company except with the leave of the Court, and subject to such terms as the Court may impose (*z*). The reasons already noticed for making a distinction between actions and suits on the one hand, and executions on the other, and the decisions referred to in connection with that distinction ought to be borne in mind when considering these enactments (*a*).

(*p*) *McEwen v. London and Bombay and Mediterranean Bank*, 1 Weekly N. 407, L. J.; *Hagell v. Currie*, 2 ib. 75.

(*q*) *Wilson v. Natal Investment Co.*, 2 Weekly N. 68.

(*r*) *Hagell v. Currie*, ib. 75.

(*s*) *Ante*, p. 1219.

(*t*) See §§ 196 to 198, and 199, 201, 202, and 204.

(*u*) § 197.

(*x*) § 201.

(*y*) See the sections 197 and 201.

(*z*) §§ 198 and 202.

(*a*) *Ante*, p. 1256.

Where a debt has been contracted by an unincorporated company, and the company is afterwards registered, those persons only who are members of the company at the time of registration become members of the incorporated company. Consequently, even although such company may be afterwards wound up, the common law liabilities of persons who had ceased to be shareholders before the registration of the company remain wholly unaffected, and may be enforced as if the company had never been registered or ordered to be wound up. Thus in *Lanyon v. Smith* (b), a cost-book mining company was formed, and whilst the defendant was a member of it the debt to the plaintiff was contracted; the defendant sold and transferred his shares and ceased to be a shareholder; afterwards the company was registered and ordered to be wound up. The defendant's name was placed on the list of contributories as a past member, but the plaintiff nevertheless sued him at law; and the Court of Queen's Bench held that the action ought not to be stayed, in as much as the defendant never was a member of the company being wound up, and his name ought not to have been placed on the list of contributories of that company.

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Debts contracted
before registra-
tion.

*Lanyon v.
Smith.*

SECTION VII.—PROCEEDINGS UNDER COMPULSORY WINDING-UP ORDERS.

1. Generally.

A compulsory winding-up order is in the following form, "This Court doth order that the — company be wound up by this Court under the provisions of the Companies act, 1862" (c). Under the Winding-up acts of 1848 and 1849, the order dissolved the company (d); but under the act of 1862, the company is not dissolved until the winding up is completed (e).

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(b) 3 B. & Sm. 938. *Harvey v. Clough*, 2 New R. 204, Ex., was a precisely similar case.

(c) See the orders, schedule 3, form 3.

(d) See 11 & 12 Vict. c. 45, § 16,

and form 2 in the schedule; *Ex parte Barber*, 1 Mac. & G. 183; *Re North of England Banking Co.*, 1 De G. & S. 545; and *Re Newcastle, &c., Bank*, 17 Beav. 470.

(e) 25 & 26 Vict. c. 89, §§ 111

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Notice of the
order.

When a winding-up order is made, notice is to be given to the registrar of joint-stock companies (*f*); and the order must be advertised, within twelve days after the date thereof, by the petitioner in the "London Gazette," and be served upon such persons (if any) and in such manner as the Court may direct (*g*). A form of advertisement is given in the third schedule to the rules promulgated under the act (*h*).

These rules apply as well to orders for winding up compulsorily as to orders for winding up subject to the supervision of the Court (*i*); but the remaining proceedings under such orders are so different that it is necessary to distinguish the one class of orders from the other. In the present place the proceedings under a compulsory order will be alone adverted to; those under an order to wind up subject to the supervision of the Court will be noticed in a subsequent section.

General prac-
tice.

The general practice of the Court of Chancery, including the practice in winding up companies under the older winding-up acts, applies to the winding up of companies under the Companies act, 1862, so far as such practice is not inconsistent with that act, and the rules which have been issued under its authority (*k*). For the general practice of the Court of Chancery, the reader is referred to modern treatises on that subject. Those matters only which have special reference to the winding up of companies will be found in the present work, and for detailed information on minor points of practice the reader is referred to the Companies act, 1862, and to the rules which, with a full index to them, will be found in the appendix (*l*).

Before the abolition of the Master's office, winding-up pro-

and 143. As to the jurisdiction of the Court over a company actually dissolved, see *Crookhaven Mining Co.*, L. R. 3 Eq. 69.

(*f*) § 88.

(*g*) Rule 6. As to dispensing with the advertisement under the old practice, see 12 & 13 Vict. c. 108, § 16; and *Re Worcester Corn Exchange*, 15 Jur. 960, where the advertisement of an order of reference as to the expediency of winding up a company was dispensed

with.

(*h*) See form No. 5.

(*i*) See as the advertisements, rule 6; and as to the notice to the registrar, see §§ 88 and 151.

(*k*) See § 170, and rule 74; *Luard's case*, 1 De G. & J. 533. Although rules have been made under § 170, it is apprehended that in cases not provided for the old winding-up practice would be followed; but see the section.

(*l*) See index, No. 1, *infra*.

ceedings subsequent to the order were carried on before the master to whom the order was referred (*m*).

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The present practice is for the judge who makes the winding-up order to refer the prosecution of it to his own chambers; the winding up is then proceeded with there by his chief clerk, and under his own immediate superintendence (*n*). The decision of the judge himself can always be required as a matter of right; no one being bound to abide by the decision of the chief clerk (*o*). The judge, moreover, is empowered to do in chambers everything which the Court is authorised to do by the Companies act, 1862 (*p*).

Proceedings in chambers.

As soon as practicable after a compulsory winding-up order is made, it is the duty of the Court to settle the list of contributories, and to cause the assets of the company to be collected and applied in discharge of its liabilities (*q*). To work out the order, a copy of it must be left by the petitioner at the chambers of the judge within ten days after the order has been passed and entered (*r*); and in default any other person interested in the winding up may leave the same, and the judge may, if he thinks fit, give the carriage and prosecution of the order to such person (*s*). Upon the copy of the order being left, a summons to proceed upon it must be taken out and served upon the parties who appeared upon the hearing of the petition (*t*). Upon the return of the summons the judge may fix a time for the appointment of an official liquidator, and for the proof of debts, and for the list of contributories to be brought in, and directions may be given as to the advertisements to be issued for such purposes, and generally as to the

Proceedings after the order.

(*m*) The powers of the master were regulated by 11 & 12 Vict. c. 45, §§ 91, *et seq.*; 12 & 13 Vict. c. 108, §§ 15, *et seq.*

(*n*) See *Wheal Virtue Mining Co.*, 3 Jur. 659; *Re Newcastle, &c., Bank*, 17 Beav. 470.

(*o*) *Agricultural Cattle Insurance Co.*, 3 De G. F. & J. 194.

(*p*) See § 83, and rule 73.

(*q*) § 98.

(*r*) Rule 7.

(*s*) *Ib.* *Ex parte Baker*, 3 De G.

& Sm. 243. It is presumed that a similar rule would apply where the petitioner delayed to draw up the order. The carriage of order will not, however, be given to a person who could not himself obtain a compulsory order, if his object is to force on proceedings which others are desirous of staying, *Brighton Club and Norfolk Hotel Co.*, 1 Weekly N. 362.

(*t*) Rule 7.

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proceedings and the parties to attend (*u*). The proceedings under the order are to be continued by adjournment, and when necessary by further summons, and any directions may be given, added to, or varied, at any subsequent time as may be found necessary (*x*).

Attendance of
parties.

With respect to the attendance of parties, every contributory on the list, and every creditor of the company whose debt or claim is allowed, is entitled, at his own expense, to attend the proceedings before the judge, and to have notice thereof (*y*). Every person desirous of attending must leave the name and address of himself and of his solicitor at the judge's chambers (*z*). The judge, moreover, may appoint any one or more of the contributories or creditors to represent before him, at the expense of the company, all or any class of the contributories or creditors, upon any question as to a compromise with any of the contributories or creditors, or in and about any other proceedings before him relating to the winding up of the company, and may remove the person or persons so appointed (*a*).

Service of
notices.

Service of notices, &c., upon contributories and creditors may be effected (when personal service is not required) by letter sent through the post; and such service is to be considered as made at the time the letter ought to be delivered in the due course of delivery by the post-office (*b*).

Wishes of credi-
tors and contri-
butories to be
consulted.

In all matters relating to the winding up of companies, the Court may have regard to the wishes of the creditors or contributories (*c*), and may direct meetings to be held in order to ascertain their wishes, and may appoint a person to act as chairman (*d*). When the judge directs a meeting to be held under this section (*e*), the official liquidator is to give notice in

(*u*) Rule 7.

(*x*) *Ib.*

(*y*) *Ib.* 60.

(*z*) *Ib.* 62.

(*a*) *Ib.* 61. As to discharging the petitioner from further attendance, see *Barber's case*, 1 De G. & S. 726.

(*b*) Rules 63 and 64, and see §§ 62 and 63 of the act.

(*c*) Including alleged contribu-

tories, see § 74.

(*d*) See as to submitting proposals with reference to matters arising in the winding up, *Slatter's Executors*, 5 De G. & S. 34, and 1 De G. Mac. & G. 64.

(*e*) The direction is to be testified by a memorandum signed by the chief clerk. See rule 47, and the form in schedule 3, No. 47.

writing, seven days before the day appointed for the meeting, to every creditor or contributory of the time and place appointed for the meeting, and of the matter upon which the judge desires to ascertain the wishes of the creditors or contributories (*f*). The notice may, however, be given by advertisement, if the judge so directs (*g*). Votes may be given at such meetings either personally or by proxy (*h*), but no creditor can vote by proxy unless his debt has been allowed, and no contributory can so vote unless he is settled on the list (*i*). The form in which the chairman of the meeting is to report its result is given in the 3rd Schedule to the Rules, No. 48.

The right of creditors and contributories to inspect the books of a company being wound up, by or subject to the supervision of, the Court is made by the act to depend entirely on the Court itself (*k*). But by one of the rules promulgated under the authority of the act, every contributory (*l*), and every creditor, whose claim has been allowed, is entitled, at his own expense, to inspect and take copies of anything on the file of documents which the official liquidator is required to keep (*m*). This subject will be alluded to hereafter when noticing the duties of the liquidators.

Inspection of
books, &c.

2. *Extraordinary powers of the Court.*

In order to enable the Court more effectually to exercise its winding-up jurisdiction, certain extraordinary powers are conferred upon it which it will be convenient here to notice (*n*). The court which will be referred to in the following pages will,

(*f*) Rule 45, and, for the form of notice, see the 3rd schedule, No. 45.

(*g*) Rule 45.

(*h*) Rule 46, and, for the form of proxy, see schedule 3, No. 46.

(*i*) Rule 46. This, it is presumed, is what is meant by the expression "contributory of the company" at the end of rule 46.

(*k*) See § 156. *Ex parte Walker*, 15 Jur. 853. But see as to sum-

moning liquidators, and examining them, *Barned's Bank*, 2 Weekly N. 62, L. J.

(*l*) Including an alleged contributory, § 74.

(*m*) Rule 58. *Ex parte Brinsley*, 1 Weekly N. 340; *Joint Stock Discount Co.*, ib. 341.

(*n*) These extraordinary powers are in addition to and not restrictive of the ordinary powers of the Court § 119.

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Power to sum-
mon and ex-
amine.

Commissioners
for taking evi-
dence.

Attendance for
examination.

however, be only the Court of Chancery in England, the reader being referred to the act itself for information as to other courts (*o*). Substantially, however, their powers will be found to be much alike.

In order to enable the Court to ascertain the real state of its affairs, the Court is empowered, after making a winding-up order, to summon before it any officer of the company or any person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to it, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate or effects of the company; and the Court may require him to produce any books or documents in his power relating to the company (*p*), and may examine him upon oath concerning its affairs (*q*).

The judges of the county courts sitting at places more than twenty miles from London, and the commissioners of bankrupts, and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, are made commissioners for taking evidence under the act, and examining any witnesses whom the Court may direct to be examined by them (*r*). Provision, moreover, is made for the examination of persons in Scotland (*s*).

The proper mode of obtaining the attendance of a person for examination under § 117 is by summons, not by subpoena (*t*).

A person is not bound to attend unless his expenses are tendered him (*u*). A witness who does not answer to the satisfaction of the judge acting in the winding up, or who refuses to produce documents which he ought to produce, is liable to commitment (*x*): and a person is not justified in refusing to be sworn on the ground that it is necessary for him to have counsel's assistance during his examination, and he cannot

(*o*) As to the jurisdiction of the Stannary Courts, see §§ 68, 83, 108, 116, 120, and 172.

(*p*) § 115.

(*q*) § 117. For the summons, see form 54 in the 3rd schedule to the rules.

(*r*) § 126.

(*s*) § 127.

(*t*) *English Joint-Stock Bank*, L. R. 3 Eq. 203.

(*u*) See § 115, and *Mercer's case*, 5 De G. Mac. & G. 26, and 2 Sm. & G. 87.

(*x*) *Stone's case*, 3 De G. & S. 120.

obtain such assistance (*y*). A person is liable to examination under § 117, although there may be a pending litigation between him and the company, and his examination may relate to the subject-matter of such litigation (*z*).

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The power of compelling the production and delivery up of documents only extends, however, to such documents as may be required to be produced and delivered up, consistently with established rules (*a*). Therefore, the solicitors of a company being wound up are not compellable to deliver up the accounts, deeds, or documents of the company in their possession, but upon which they have a lien for their costs, even although the liquidator may undertake to pay such costs out of the first funds which come to his hands (*b*).

Compelling
production of
documents.

Official liquidators may be examined by contributories, or alleged contributories, or by creditors, and be compelled to produce the company's books for inspection (*c*).

In order to prevent persons liable to contribute to the payment of the debts of the company from escaping from justice and avoiding examination, the Court may, either before or after making a winding-up order, cause any contributory or alleged contributory (*d*) to be arrested, and his books, money, and effects to be seized, if proof is given that there is probable cause for believing that he is about to abscond, or to remove or conceal any of his goods or chattels for the purpose of evading the payment of calls, or examination (*e*).

Power to arrest.

In order to facilitate the collection of the company's assets, the Court may order any contributory settled on the list, and any trustee, receiver, banker, or agent, or officer of the company, to hand over any books, monies, or effects in his hands, and to which the company may be *prima facie* entitled (*f*).

Summary order
to hand over
money, &c., to
official liqui-
dator.

(*y*) *Ex parte Bunn*, 3 Jur. N. S. 1013. This case arose in Chambers. The judgment shows that the person summoned should, after he has been sworn, apply to be examined before the judge or an examiner.

35 Beav. 35.

(*z*) *Ex parte Bateman*, 1 Weekly N. 378, affirmed, *ib.* 466.

(*b*) *Potter's case*, 1 De G. & S. 728. Compare *Cameron's Coalbrook Rail. Co.*, 25 Beav. 1.

(*c*) *Barned's Banking Co.*, 2 Week. N. 62, L. J. See *infra*, 1272.

(*d*) § 74.

(*e*) § 118.

(*f*) § 100.

(*a*) An order will not be made *ex parte*. *Commercial, &c., Wine Co.*,

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The Court may also order any contributory settled on the list to pay any monies due from him or from the estate of the person he represents to the company, exclusively of any calls made in the winding up (*g*). If the company is limited, payment under this section must be made irrespectively of any set-off; but if the company is unlimited, set-off may be allowed in respect of monies due from the company otherwise than on account of dividends or profits (*h*). The payment of calls is also enforced by a summary order (*i*).

All monies ordered to be paid under these sections are to be paid into the Bank of England, unless specially directed to be paid to the official liquidator (*k*).

These summary powers of obtaining money belonging to the company were introduced in the Winding-up act of 1848 (*l*); and from the decisions on that act it seems to have been thought that these powers ought not to be exercised where there was a serious question as to the right of the company to what was withheld from it (*m*); but in a recent and difficult case arising under the Joint-stock companies acts, 1856-8, the Master of the Rolls dismissed a bill filed by the liquidators of a company against contributories to compel them to deliver up assets of the company which they claimed as their own; his lordship being of opinion that the proper remedy was by an application to the court of bankruptcy in which the company was being wound up, and not by a bill in equity (*n*); and this decision was affirmed by Lord Chelmsford on appeal (*o*).

Not exerciseable
over strangers.

The summary powers conferred by the sections alluded to above cannot be exercised against a debtor to the company if he is not a contributory, trustee, receiver, banker, or agent or

(*g*) § 101.

(*h*) § 101. As to set-off, see *infra*, Section 9.

(*i*) §§ 102 and 103.

(*k*) §§ 103 and 104, and rule 38. See, as to enforcing payment into the bank, *Leeds Banking Co.*, L. R. 1 Ch. App. 150.

(*l*) 11 & 12 Vict. c. 45, §§ 66 and 67. See *Ex parte Chadwick*, 15 Jur. 597.

(*m*) See *Carpenter and Weiss's*

case, 5 De G. & S. 402; *Ex parte Johnson*, 1 Jur. N. S. 913; *Ex parte Chadwick*, 15 Jur. 597.

(*n*) *Cardiff Coal Co. v. Norton*, L. R. 2 Eq. 558.

(*o*) 2 Weekly N. 48. Lord Chelmsford concurred in thinking the bill unnecessary and improper, but he also held on the merits that the assets sought to be recovered were not assets of the company.

officer of the company; and therefore an order made on the assignees of a bankrupt solicitor to a company to repay to the official manager money paid by the company to the solicitor on account, but in excess, of his bill of costs, was held to have been made improperly (*p*).

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Under the acts of 1848-9, it was doubtful whether directors could be compelled, by the summary process alluded to above, to make good monies of the company misapplied by them where the misapplication was denied (*q*). But by the act of 1862 the Court is expressly empowered to examine into the conduct of any director, manager, liquidator, or other officer, if it appears that he has misapplied, or retained in his own hands, or become liable or accountable for, any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company; and the Court is empowered to compel him to repay such monies, with interest, or to make such compensation to the company as the Court may deem just (*r*). A doubt has been raised whether this clause applies where a company is being wound up voluntarily (*s*); and where there was not evidence enough to decide that the directors had been guilty of a breach of trust, although there was quite sufficient to raise a strong case of suspicion against them, the Court refused to make any summary order or to direct any inquiry against them; but liberty was given to the complainants to file a bill in the name of the company, the complainants giving an indemnity against the costs (*t*). The section under consideration has also been held not to apply where it is sought to charge the estate of a deceased director (*u*).

Exercisable
over directors.

Power to investi-
gate conduct of
directors, &c.
§ 165.

Lastly, the Court may order any past or present director, manager, officer, or member of a company ordered to be wound up by the Court, or subject to its supervision, or being wound up voluntarily, to be criminally prosecuted, at the expense of

Power to order
prosecution.

(*p*) *Hollingsworth's case*, 3 De G. & S. 102. See, also, *Cox's case*, ib. 180; and *Northfield Iron and Steel Co.*, 1 Weekly N. 253, where the Court refused to order a railway company to deliver up goods on which it claimed a lien.

(*q*) See *ante*, note (*m*).

(*r*) § 165.

(*s*) *Bank of Gibraltar and Malta*, L. R. 1 Ch. App. 69, and 34 Beav. 556. See § 138 of the act.

(*t*) *Ib.*

(*u*) *Feltom's Executors' case*, L. R. 1 Eq. 219.

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the company, if it shall appear that he has been guilty of any offence in relation to the company for which he is criminally responsible (x).

3. *Mode of enforcing orders and appeals from them.*

By the Companies act, 1862, provision is made for enforcing the orders of the English, Irish, and Scotch courts in those parts of the United Kingdom which are out of their respective jurisdictions (y).

Orders made by the Court of Chancery in England are enforced in the same way as orders made in a suit are enforced (z), *i. e.*, commonly by attachment. But orders to pay money may be enforced by the ordinary writs of *fi. facias*, *levari facias*, *capias ad satisfaciendum*, and, if necessary, by sequestration (a). Where it is desired to issue a *fi. fa.*, an order should be obtained for payment to the liquidator himself, and not for payment into the Bank to his account (b).

Appeals.

Orders and decisions of the Court may be appealed from in the ordinary way; but notice of appeal must be given within three weeks after the making of the order complained of (c), *i. e.*, from the day on which the order is pronounced, not from the day on which it is actually drawn up, passed, or entered by the registrar of the court (d). The court of appeal, however, has power to extend the time (e).

The application for leave to appeal after the three weeks have expired, may be made *ex parte*, and if leave is granted it will

(x) §§ 167, 168, and see rule 51.

(y) §§ 122 and 123.

(z) § 120.

(a) If a person is abroad and cannot be attached, a sequestration may issue without a previous attachment, *Ex parte Hall*, 2 Dr. & Sm. 284.

(b) *Leeds Banking Co.*, L. R. 1 Ch. App. 150. See, also, *Waterloo Life Assurance Co.*, 4 New R. 207.

(c) § 124. Quære whether this applies to a re-hearing before the

same judge. Compare *Sanderson's case*, 3 De G. & S. 66; *Ex parte Besley*, 3 Mac. & G. 287.

(d) *Risca Coal Co.*, 8 Jur. N. S. 900; *Re Hopkins*, 9 ib. 702. But see *Ex parte Heslop*, 1 De G. Mac. & G. 477.

(e) § 124. Under the older acts the time could not be extended: *Ex parte Sanderson*, 1 Mac. & G. 306; *Re Green*, 1 Jur. N. S. 33; but see *Ex parte Besley*, 3 Mac. & G. 287.

be without prejudice to any objection which the respondent may make (*f*). Bk. IV. Chap. 3.
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Under special circumstances, a second re-hearing before the appeal court will be allowed, although more than three weeks have elapsed since the first re-hearing (*g*). An appeal upon a point not before the judge appealed from will not be heard (*h*).

Winding-up orders themselves may be appealed from, without special leave, after three weeks from their date (*i*). Appeals from
winding-up
orders.

The Lord Warden of the Stannaries is empowered to remit appeals to Court of Appeal in Chancery (*k*). Appeals from
the Stannaries.

SECTION VIII.—THE LIQUIDATORS OF THE COMPANY.

The actual management of the winding up of a company is entrusted to persons called liquidators, whose powers and duties are extremely important. Div. 1. Sect. 8.

Liquidators are of two different kinds: the one called provisional liquidators, who are merely temporary officers in the nature of receivers and are appointed in order to protect the assets of the company until other liquidators are appointed (*l*); whilst the other kind of liquidators, called official liquidators, or simply liquidators (according as the company is being wound up compulsorily or otherwise), are the persons who have the actual management of the winding up.

1. *Provisional liquidators.*

A provisional liquidator may be appointed by the Court as soon as a petition for winding up has been presented (*m*). The application for his appointment is made by summons, without Appointment of
provisional liqui-
dators.

(*f*) *Hull Forge Co.*, 15 W. R. 388. They are published by Stevens and Haynes.

(*g*) *Ex parte Besley*, 3 Mac. & G. 287. (*l*) See *Brettell v. Dawes*, 7 Ex. 307, as to the distinction between an interim and an official manager under the Winding-up acts of 1848-49.

(*h*) See *St. George's Steam Packet Co.*, 1 Mac. & G. 291.

(*i*) *Ante*, p. 1247.

(*k*) § 124. Rules relating to Stannary appeals have been issued. (*m*) § 85, and see §§ 196, 199, 204.

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advertisement or notice to any person, unless the judge shall otherwise direct (*n*). A provisional liquidator may be appointed without security (*o*); but the other rules relating to official liquidators apply to those provisionally appointed, so far as such rules are applicable and subject to any directions which may be given in any case by the judge (*p*). A form of order appointing a provisional liquidator is given in the rules (*q*).

It is not usual to appoint a provisional liquidator if the company opposes such an appointment (*r*); and where a creditor who had presented a petition to wind up a company had obtained *ex parte* an order appointing a provisional liquidator, the order was afterwards discharged on the application of the company (*s*). The appointment of a provisional liquidator is not necessary in order to invalidate dealings with the company's property since the commencement of the winding up (*t*); nor to stay actions, &c., by creditors (*u*).

Duties of provisional liquidators.

Neither the act nor the rules specify with any particularity what the duties of a provisional liquidator are. But the order appointing him usually removes all ambiguity on this point, by stating explicitly what he is to do (*x*). Speaking generally, his duty is to act as a receiver and to protect the assets of the company.

A provisional liquidator ought to be served with notice of any application to discharge or stay proceedings under a winding-up order (*y*). But in one case he was not allowed his costs of appearing on a petition to wind up subject to supervision, although it was presented after the petition under which he was appointed (*z*).

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| (<i>n</i>) Rule 15. | N. 196, M. R. |
| (<i>o</i>) <i>Ib.</i> See <i>Marseilles Extension Rail. Co.</i> , 2 Weekly N. 68. | (<i>t</i>) <i>Ante</i> , p. 1251. |
| (<i>p</i>) Rule 59. | (<i>u</i>) <i>Ante</i> , p. 1252, <i>et seq.</i> |
| (<i>q</i>) Schedule 3, No. 9. | (<i>x</i>) See the form, schedule 3, No. 9. |
| (<i>r</i>) See Lord Romilly's observation in <i>Emmerson's case</i> , L. R. 2 Eq. 236. | (<i>y</i>) <i>Ex parte Coleman</i> , 3 De G. & S. 139. |
| (<i>s</i>) <i>Railway Finance Co.</i> , 1 Week. | (<i>z</i>) <i>General International Agency Co.</i> , 5 New R. 265, M. R. |

2. *Official liquidators.*

For the purpose of conducting the proceedings in winding up a company, and assisting the Court therein, the Companies act, 1862, empowers the Court to appoint one or more official liquidators (*a*), and to remove them for due cause (*b*).

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Appointment of
official liquidator.

The appointment of the official liquidators lies with the judge, and is to be made by a distinct order (*c*). The appointment may be made without previous advertisement or notice to any one (*d*); but the judge may, by advertisement, fix a time and place for the appointment. He is not, however, bound to appoint the person who may be nominated by those who attend pursuant to the advertisement (*e*).

The appointment of any particular person as liquidator is so entirely a matter for the discretion of the judge, that the court of appeal will not review his decision (*f*). But the same rule does not apply to appointments by the judge's chief clerk; the parties interested are entitled to have the appointment considered and determined by the judge himself; and if he declines to reconsider an appointment by his chief clerk, an appeal lies (*g*).

The official liquidators are required to give security, by entering into a recognisance, with two or more sureties, in such sum as the judge may approve (*h*). When the proper security has been given, a certificate to that effect is to be made by the chief clerk (*i*). Fresh securities may from time to time be required (*k*).

Security.

As soon as an official liquidator has been appointed, and has given security, his appointment is to be advertised (*l*).

Advertisement of
appointment.

(*a*) § 92.

(*b*) § 93.

(*c*) Rules 8, 11, and schedule 3, No. 8.

(*d*) Rule 8. He may be appointed on the hearing of the petition for a winding-up order: *London, Bombay and Med. Bank*, L. R. 1 Ch. App. 525.

(*e*) See rules 8 & 9, and schedule 3, Nos. 6-8.

(*f*) *International Contract Co.*, L. R. 1 Ch. App. 523; *London, Bombay, and Mediterranean Bank*,

ib. 525. See, also, *Merchant Traders' Ship Loan and Association Co.*, 15 Jur. 981, and compare this with the case cited in the next note.

(*g*) *Agricultural Cattle Insurance Co.*, 3 De G. F. & J. 194. See the observations in this case as to the employment of accountants.

(*h*) See § 92 and rule 10, and the forms 10 and 11 in schedule 3.

(*i*) Rule 12.

(*k*) Rule 13.

(*l*) Rule 14, and see schedule 3, No. 15.

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Vacancies.

In the case of the death, removal, or resignation of an official liquidator, another is to be appointed in his room in the same manner as in the case of a first appointment, and the proceedings for the purpose may be taken by such person interested as may be authorised by the judge to take the same (*m*).

Remuneration.

The remuneration of the official liquidator is fixed by the judge (*n*).

Solicitor.

The official liquidator may, with the sanction of the judge, appoint a solicitor to assist him in his duties (*o*). The solicitor's duty is to conduct all such proceedings as are ordinarily conducted by solicitors of the court (*p*).

Passing accounts.

Official liquidators are required to pass their accounts like receivers (*q*), and to pay all monies which they may receive into the Bank of England (*r*); and to deposit all bills, notes, and other securities payable to the company in the bank, for the purpose of being presented by it for acceptance and payment (*s*).

Books of the company.

It is the duty of the official liquidator to take possession of all the company's books and accounts (*t*), and to make up and rectify the books of the company, and to keep books showing its debts and credits, and also a ledger, containing the separate accounts of the contributories (*u*).

Inspection.

The right of the creditors and contributories of the company to inspect its books and papers depends upon the order which the Court may think fit to make upon the subject (*x*). The general rules direct all documents relating to the winding up of a company to be filed, and entitle every contributory and creditor whose debt has been proved to inspect and have copies of such documents (*y*). This rule, however, does not in terms apply to the books of the company. If an inspection of them

(*m*) Rule 16.

(*n*) See § 93 and rule 18. *North of England Banking Co.*, 3 Mac. & G. 362, note.

(*o*) § 97. See *Bass's case*, 1 De G. & S. 722.

(*p*) Rule 68.

(*q*) Rule 19.

(*r*) Rules 11 and 36. They have no business to lend money in their hands even for short periods and

on good security. See Lord Romilly's observations in 1 Weekly N. 327.

(*s*) Rules 37 and 41.

(*t*) See §§ 94 and 100. See under the old acts, *Pell's case*, 3 De G. & Sm. 170.

(*u*) Rule 17.

(*x*) § 156.

(*y*) Rule 58.

is desired, an application must be made to the judge under § 156 of the act (z). An order for inspection will be made if the Court is satisfied that the inspection is wanted for a proper purpose (a); and liberty will be given to an accountant to attend if there are complicated accounts to be investigated (b). The liberty to inspect, however, must not be abused; and the Court will interfere to prevent an improper disclosure of the contents of the books (c).

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As between contributories and alleged contributories, the books, accounts, and documents of the company and of the liquidators, are *prima facie* evidence of the truth of all matters purporting to be therein recorded (d). This is a very important provision, and one of which unfair use might be made if there were no means of compelling liquidators to expunge from their books matters improperly inserted in them. But a liquidator is not entitled to charge a person with money without notice, and then require him to show that he does not owe it; and if any attempt to do so is made, the Court will order the entry to be removed, and throw upon the liquidator the onus of showing that such entry ought to be restored (e).

Official liquidator's books evidence against contributories.

Under the Winding-up acts of 1848 and 1849, the property of the company vested in the official manager (f); and all actions and suits by or against the company had to be brought by or against him as its representative (g). He, however, only represented the company which was being wound up; and consequently, actions in which it was sought to charge, not the

Extent to which the liquidator represents the company under Acts of 1848 and 1849.

(z) As to summoning the liquidator as a witness, see *Barned's Bank*, 2 Weekly N. 62, noticed *ante*, p. 1265.

(a) *Ex parte Brinsley*, 1 Weekly N. 340; *Joint Stock Discount Co.*, ib. 341.

(b) *Ib.*

(c) *Ib.*

(d) § 154

(e) *Ex parte Chadwick*, 15 Jur. 597.

(f) 11 & 12 Vict. c. 45, §§ 29 and 30.

(g) *Ib.* §§ 50 and 51. See, on this subject, *Grand Trunk Rail. v.*

Brodie, 3 De G. Mac. & G. 146; *Riddick v. Deposit, &c., Association Co.*, 9 Ir. Com. Law Rep. 84; *McDowell v. Davis*, 8 ib. 42. As to the mode of describing him, see *Re Heritage*, Kay, App. 29. The official manager only represented the company if his appointment was valid. See *Official Manager of Plumstead Water Co. v. Davis*, 28 Beav. 545, and 2 De G. F. & J. 20, where the winding-up order and all the proceedings under it were invalid, the order having been made by the wrong court.

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company, but one or more of its contributories individually, had to be brought against him or them, and not against the official manager (*h*).

Moreover, where the company being wound up could not have been sued at law, either as a company or by a public officer, there an action against the official manager as the representative of the company could not be sustained. The acts in question did not confer on companies any capacity of suing and being sued, but simply declared that companies having that capacity were to sue and be sued by their official manager (*i*). Consequently, a company, not registered or in any way incorporated, but being a mere association of individuals, could not sue or be sued by its official manager (*k*).

Under the Act
of 1862.

In the foregoing respects, the Companies act, 1862, is very different from the older winding-up acts. It is the duty of the official liquidator to take into his custody the property and effects of the company (*l*): and if no liquidator is appointed, or during any vacancy in his appointment, the property of the company is in the custody of the court (*m*); but the property of a company registered under the act does not vest in the liquidator, and all actions and suits are taken and continued by and against the company in its corporate name (*n*). In the case, however, of an unregistered company, the Court has power to make an order vesting its property in the liquidator; and, if such an order is made, he may sue and be sued in his official name, or in such other name as the Court may direct, as the representative of the company (*o*).

As regards unregistered companies, therefore, the decisions on the acts of 1848 and 1849 may still be usefully referred

(*h*) *Beardshaw v. Lord Londesborough*, 11 C. B. 498; *McDowell v. Doyle*, 7 Ir. Com. Law, 598; *Armstrong v. Normandy*, 7 Ex. 409.

(*i*) *Pritchard v. London and Birmingham, &c., Rail. Co., Re Weiss*, 15 C. B. 331; *Ernest v. Weiss*, 2 Dr. & Sm. 561.

(*k*) *Ib.*, and see *Russell v. Croysdill*, 11 Ex. 123, and *Ernest v. Croysdill*, 2 De G. F. & J. 175, where the plaintiff represented one

provisionally registered company, and the defendant another.

(*l*) § 94.

(*m*) § 92. The liquidator is himself in the nature of a receiver, and a receiver will not therefore be appointed of assets in his hands, *Bank of Hindustan v. Coleman*, 1 Weekly N. 306.

(*n*) See §§ 94 and 95, and 195, 196.

(*o*) See § 203.

to (p); but it must not be overlooked that the language of the 203rd section of the Companies act, 1862, differs materially from that of the acts on which those decisions turned.

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The official liquidators are to be described by their style of office, and not by their individual names (q); and they are to perform such duties in reference to the winding up of the company as may be imposed by the Court (r).

Duties of liquidators.

Their duties, so far as they relate to the investigation of claims against the company, to settling the list of contributors, to making calls and distributing the assets of the company, will be noticed in the subsequent sections of this chapter. In the present section it is proposed to notice those general powers and duties which do not relate to these matters.

Where more official liquidators than one are appointed, it is for the Court to declare whether any act authorised or required by the statute to be done by the official liquidator is to be done by all or any one or more of the persons so appointed (s).

Power of liquidators where there is more than one.

The official liquidator has power to do the following things with the sanction of the Court, or without it, if previously authorised by the Court to act without consulting it (t):

Powers of liquidator.

1. To institute or defend legal proceedings in the name and on behalf of the company (u).

2. To carry on the business of the company so far as may be necessary for the beneficial winding up of the same (x).

3. To sell the property of the company by auction or otherwise (y).

4. To do all acts, and to execute in the name and on behalf

(p) They are collected, *ante*, notes, (g) to (k).

(q) § 94. See, also, § 203.

(r) § 94.

(s) § 92, and see the rules, schedule 3, No. 8. See under the older acts, *Bass's case*, 1 De G. & Sm. 722.

(t) § 96.

(u) § 95. See as to unregistered companies, § 203, and *ante*, notes (g) to (k), and *Turquand v. Kirby*, 2 Weekly N. 116.

(x) § 95.

(y) § 95, and see as to sales, rule 32, and as to transferring the business of the company, *infra*, p. 1277. As to opening biddings, see *Northumberland and Durham Banking Co.*, 9 W. R. 584, V.-C. K.; and as to getting in the legal estate, *Sheerness Waterworks Co. v. Polson*, 3 De G. F. and J. 36, and 29 Beav. 70; as to purchases by old directors, and irregular proceedings, at the sale, see *Alexandra Hall Co.*, 2 Weekly N. 66.

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of the company all deeds, receipts, and other documents, and for that purpose to use the company's seal (z).

5. To prove as a separate creditor against the estate of a bankrupt contributory for money due from him to the company (a).

6. To draw, make, accept, and indorse bills of exchange and promissory notes in the name and on behalf of the company, and to raise money upon the security of its assets (b).

7. To take out, if necessary, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act that may be necessary for obtaining payment of any monies due from a contributory or his estate, and which cannot be conveniently done in the name of the company (c).

8. To do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets (d).

Compromises.

The official liquidator is further empowered, with the sanction of the Court, to make arrangements with creditors and contributories, and to compromise all claims whether by or against the company (e). A proposed compromise will not be sanctioned by the Court in the absence of sufficient information as to the grounds on which the compromise is to be entered into (f). A compromise entered into by an official liquidator, and approved by a chief clerk, does not require the personal sanction of a judge to make it binding. But any person aggrieved by it is entitled to have it considered by the judge in whose chambers the winding up proceeds (g).

(z) § 95.

(a) § 95. As to his power to petition for an adjudication of bankruptcy against a contributory, see *Williams v. Harding*, L. R. 1 App. Ser. House of Lords, 9.

(b) § 95. The liability of the company upon such bills or notes is the same as if the company had issued them in the course of its business: see the section. As to negotiating bills in order to avoid a set-off, see *Smith, Fleming, and*

Co.'s case, and *Gledstanes and Co.'s case*, L. R. 1 Ch. App. 538, noticed in the next section.

(c) § 95.

(d) § 95.

(e) §§ 159 and 160, and see rule 61.

(f) *Ex parte Totty*, 1 Dr. & Sm. 273, and on appeal 6 Jur. N. S. 849.

(g) *Ex parte Garstin*, 10 W. R. 457, V.-C. K.

The extent of the power to effect a compromise was discussed in the case of *The Risca Coal and Iron Company* (h), where a claim against a company was compromised upon certain terms, one of which was that some contributories and alleged contributories should not be put on the list. The compromise was sanctioned though opposed by one of the contributories.

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A compromise with the sanction of the Court is binding on all parties, unless appealed against in due time (i).

But if it can be shown that the sanction of the Court was obtained by the misrepresentation or improper concealment of material facts the compromise will be set aside by the Court which sanctioned it, although the time for appeal has passed (k).

The assets of the company may be sold and realised in the ordinary way by auction or private contract as may be thought best. Doubts have been expressed as to the power of the court in a compulsory winding up to sanction a sale of a company's assets *en masse* to a new company formed to carry on its business (l). It is, however, to be remembered that the Court can stay the winding-up proceedings altogether on such terms as it thinks proper (m); and this power, coupled with that of selling the assets of the company (n), and of compromising with the creditors and contributories (o) is, it is conceived, sufficient to give the Court jurisdiction to sanction such a sale as that under consideration upon any terms the Court may judicially approve. In the only case, however, in which this question has arisen the Court declined to sanction the proposed transfer, being of opinion that it had no power to do so, and that the terms of sale were

Transfer of
business.

(h) 30 Beav. 528. An appeal was dismissed, on the ground that it was made too late. See 8 Jur. N. S. 900.

(i) *Lucy's case*, 4 De G. Mac. & G. 356; *Underwood's case*, 5 ib. 677; *Garstin's case*, 10 W. R. 457. See, also, *Hughes' case*, 1 De G. & Sm. 606, and 13 Jur. 530.

(k) *Central Darjeeling Tea Co.*, 1 Weekly N. 361; *Clarke's case*,

ib. 254; *Garstin's case*, 10 W. R. 457.

(l) See §§ 89, 91, 95, 159, and 160. The doubt has arisen by reason of § 161 being in terms only applicable to a voluntary winding up.

(m) § 89, *ante*, p. 1248.

(n) § 95.

(o) §§ 159 and 160, and see § 91 in connection with them.

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Div. 1. Sect. 8.

not sufficiently advantageous to the creditors or contributories, some of whom opposed the scheme (*p*).

In a somewhat similar case, in which a company was being wound up subject to the supervision of the Court, the V.-C. Wood sanctioned a sale of the Indian business of the *Agra and Masterman's Bank*, although a large portion of the purchase money was to be secured by promissory notes payable by instalments extending over two years. The plan was opposed by a considerable body of creditors, and by the liquidator on behalf of those contributories who had not assented; but the great majority of creditors and more than half of the contributories supported the application, and none of the contributories had themselves actually opposed it (*q*).

Acts done without sanction of Court.

Liquidators who act without the sanction of the Court in matters requiring such sanction, expose themselves to serious risks; for if loss ensues to the company the liquidators may be compelled to make it good, and if they sue or defend an action or suit unsuccessfully, they may have to pay the costs personally (*r*). But an order made in a suit and directing a liquidator to pay the costs personally does not necessarily preclude him from afterwards obtaining such costs out of the assets of the company (*s*). The consequences of not obtaining the sanction of the Court where such sanction is required, may, moreover, in some cases invalidate the liquidator's proceedings; but it is apprehended that if he sues at law or in equity without leave the want of leave affords no defence to the action or suit (*t*).

(*p*) *General Exchange Bank*, 2 Weekly N. 63, M. R.

(*q*) *Agra and Masterman's Bank*, 1 Weekly N. 400. See, also, *Scinde, Punjaub, and Delhi Bank Corporation*, 2 ib. 41.

(*r*) *Grand Trunk, &c., Rail. Co.*, v. *Brodie*, 9 Ha. 823, and 3 De G. Mac. & G. 146; *Caldwell v. Ernest*, 27 Beav. 39 and 42.

(*s*) *Ib.* See on this subject, *Consols Insurance Co. v. Wood*, 2 Dr. & Sm. 353.

(*t*) See the analogous cases in bankruptcy, *Lee v. Sangster*, 2 C. B. N. S. 1; *Piercy v. Roberts*, 1 M. & K. 4; *Ex parte Magnus*, 3 M. D. & D. 693; *Jones v. Yates*, 3 Y. & J. 373.

SECTION IX.—PROOF AND PAYMENT OF DEBTS.

1. *General observations.*

The Court is empowered to fix a time within which creditors are to prove their debts, or be excluded from the benefit of any distribution made before such debts are paid (*u*). For the purpose of ascertaining the debts of the company, and of requiring creditors to come in and prove their debts, an advertisement is to be issued at such time as the judge may direct (*x*). The advertisement fixes a time for the creditors to send the particulars of their demands, and the names and addresses of themselves and their solicitors (if any) to the official liquidator, and appoints a day for adjudicating thereon (*y*).

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Div. 1. Sect. 9.

Time for proof.

The creditors need not attend the adjudication, nor formally prove their debts, unless required so to do by notice from the official liquidator; but, upon such notice being given, they are to come in and prove their debts within the time specified in the notice (*z*). It is the duty of the official liquidator to investigate the claims sent in, and, so far as he is able to separate those which ought to be allowed without further proof from those which ought not, and to set forth the former in an affidavit, giving the reasons why, in his opinion, they ought to be at once allowed (*a*). In adjudicating upon the debts the judge may either allow them upon official liquidator's affidavit, or require them to be further proved (*b*). Notice of allowance or disallowance as the case may be, is to be given to the creditors by the official liquidator (*c*); and those creditors whose claims have not been allowed are to have notice to come in and prove by a day named in the notice (being not less than four days after the notice), and to attend

Mode of proof.

(*u*) § 107.

(*x*) Rule 20.

(*y*) *Ib.*, and see the form in schedule 3, No. 16.

(*z*) Rule 20.

(*a*) Rule 22, and see the form of affidavit in schedule 3, No. 17.

(*b*) Rule 23.

(*c*) Rules 23 and 24.

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Div. 1. Sect. 9.

Creditors' claim
to be investi-
gated.

Costs of proof.

Certificate of
debts.

Notice of pay-
ment.

Appeal by
creditor.

Appeal by official
liquidator.

at a time to be therein mentioned, being the time for adjudication (*d*).

Under the acts of 1848 and 1849, it was held that the master or judge acting in the winding up must examine into every claim brought in before him, and either allow it or disallow it, or allow it as a claim only; and must do this after hearing such evidence as the claimant might be able to adduce; and must not allow a claim as a claim only, in order to avoid the consideration of the more difficult question, whether the claim ought to be allowed as a debt of the company (*e*). These rules are as applicable under the act of 1862 as under those of 1848 and 1849.

Creditors coming in and proving their debts, pursuant to notice from the official liquidator, are entitled to their costs of proof (*f*).

The result of the adjudication upon debts and claims is to be stated in certificates to be made by the chief clerk. The certificates are to state whether the debts or claims are allowed or disallowed, and whether allowed as against any particular assets, or in any other qualified or special manner (*g*).

A creditor whose debt is allowed is informed by notice when and where he will be paid (*h*).

If the judge acting in the winding up disallows a claim brought in before him, the creditor may appeal from the decision (*i*); he can also apparently apply for leave to take such proceedings as he may be advised, for the purpose of establishing his case at law (*k*).

On the other hand, if the official liquidator or the contributories are dissatisfied with the allowance of a debt, they can

(*d*) Rule 24, and see the forms in schedule 3, Nos. 20 and 21.

(*e*) See *Prichard's case*, 5 De G. Mac. & G. 495; and *Terrell v. Hutton*, 4 Ho. Lo. Ca. 1091. As to bringing actions to try a disputed debt, see *East of England Banking Company's case*, 5 De G. Mac. & G. 505, and 13 Beav. 426; *Ex parte Gwyn*, 1 Jur. N. S. 300; *Ex parte Higgins*, 2 ib. 178. As to enabling

a creditor to prosecute his claim *in formâ pauperis*, see *Ex parte Fry*, 1 Dr. & Sm. 318.

(*f*) Rule 27.

(*g*) Rule 28.

(*h*) See the rules, schedule 3, No. 23.

(*i*) *Ernest v. Nicholls*, 6 Ho. Lo. Ca. 401.

(*k*) As in *Armstrong's case*, 3 De G. & S. 140.

appeal (*l*); but if the official liquidator appeals, it seems the contributories are not entitled to be heard with him (*m*). Bk. IV. Chap. 3.
Div. 1. Sect. 9.

The time for appeal is the same in this as in other cases, *i. e.*, three weeks from the making of the order complained of (*n*).

2. Debts proveable.

Those claims only are proveable on the winding up of a company which are or will become enforceable at law or in equity against the company which is being wound up. Demands against the promoters or directors, or other persons, but not against the company itself, cannot be proved against it either as a debt (*o*) or a claim (*p*).

What is, and what is not, a debt of the company, must be determined upon the principles discussed in an earlier portion of the present treatise (*q*). Equitable debts are clearly proveable (*r*). But debts which are invalid in equity are not proveable, *e. g.*, claims for promotion money founded on agreements fraudulently concealed from the members (*s*). Nor are claims, founded on contracts which are *ultra vires*, enforceable against the company (*t*). Moreover, solicitors who, on behalf of the company, conduct legal proceedings arising out of transactions which are *ultra vires*, and are known by them to

What are debts
of the company.

(*l*) In *Ex parte Gwyn*, 1 Jur. N. S. 300, a contributory appealed.

(*m*) See *Continental Bank Corporation*, 2 Weekly N. 84. See, also, *Re Norwich Yarn Co.*, 13 Beav. 428 note, where, however, the contributories were heard. See, too, *Bodmin United Mines*, 23 Beav. 385.

(*n*) *Ante*, p. 1268. See *Ex parte Sanderson*, 1 Mac. & G. 306; *Ex parte Green*, 1 Jur. N. S. 33.

(*o*) *Ex parte Lloyd*, 1 Sim. N. S. 248, as explained in 2 De G. Mac. & G. 640.

(*p*) See *Wryghte's case*, 2 De G. Mac. & G. 636, and *Prichard's case*, 4 De G. & S. 328, and 5 De G.

Mac. & G. 484. See, too, *Ex parte Briggs*, 8 W. R. 110.

(*q*) See book ii. As to claims on unaccepted bills drawn on a company under an open letter of credit, see *Ex parte Asiatic Bank Corporation*, 1 Weekly N. 408.

(*r*) See *Terrell v. Hutton*, 4 Ho. Lo. Ca. 1091.

(*s*) *Ex parte Williams*, L. R. 2 Eq. 216.

(*t*) See *ante*, p. 255 *et seq.* *Ex parte Bradlaugh*, 2 Weekly N. 12, a claim for commission on a purchase of a business, disallowed on the ground of want of authority of the manager of the company to promise to pay it.

Bk. IV. Chap. 3.
Div. 1. Sect. 9.

Contingent debts
and claims to
damages.

Option to pay in
cash or shares.

Future rent.
Haytor Granite
Company.

Debts of amal-
gamated com-
panies.

be so, are not entitled to be paid for their services by the company (*u*).

Under the Companies act, 1862, all debts of the company payable on a contingency, and all claims against it, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against it (*x*). The value of those debts or claims which are subject to any contingency, or sound only in damages, or which, for some other reason, do not bear a certain value, is to be estimated as justly as possible (*y*), according to the value thereof at the date of the winding-up order (*z*). Annuity-holders, and policy-holders whose policies are not yet due, are entitled to prove for the values of their respective annuities and policies (*a*).

Where a person has agreed to take cash or shares at the option of the company in payment of his claims against the company, and he has not received either cash or shares, he cannot be compelled to take shares after the company has been ordered to be wound up; and he is entitled to rank as a creditor in respect of what the company may owe him (*b*).

Where the company is lessee for an unexpired term of years, the lessor is entitled to have a claim entered for the full amount of the rent which will become due under the lease; and he is further entitled to prevent the company from being dissolved without notice to him. But where the lease has been assigned, the lessor is not entitled to receive more from the company than it may ultimately become liable to pay under the covenants contained in the lease (*c*).

Where one company has transferred its assets and liabilities to another company, and both or either of such companies are afterwards wound up, questions of some complexity arise with reference to the debts to which they are respectively liable. In the first place it is necessary to ascertain whether the amalgamation itself was *intra vires* and binding on both companies,

(*u*) *Ex parte Howard and Doll-*
man, 1 Hem. & M. 433.

(*x*) § 158, see, too, §§ 159, 160.

(*y*) § 158.

(*z*) Rule 25.

(*a*) *Hunt's case*, 1 Hem. & M. 79;

Teete's case, 4 New R. 48, V.-C. K.

(*b*) *Sharon's claim*, 1 Weekly N.
230.

(*c*) See *Haytor Granite Co.*, L. R.
1 Ch. App. 77, reversing *ib.* 1 Eq.
11.

or *ultra vires* and binding on neither (*d*). Assuming the amalgamation to have been *intra vires*, then it will follow from the principles investigated in an earlier part of the treatise (*e*)—

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Div. 1. Sect. 9.

1. Where the amalgamation is *intra vires*.

1. That a creditor of the company which has sold its business can prove against that company unless he has in some way released it or unless his debt is barred by the statute of limitations (*f*).

2. That such creditor can prove against the purchasing company, if, but only if, that company has become liable to him by reason of some agreement, express or tacit, between it and him (*g*).

3. That the selling company is entitled to be indemnified by the purchasing company against all the liabilities of the former agreed to be taken over and discharged by the latter (*h*).

Where, however, the amalgamation is *ultra vires*, and invalid, the company which has assumed to take upon itself the liabilities of the other, cannot be made to discharge those liabilities, either by the other company or by its creditors (*i*); and the company which has assumed to transfer its debts, remains liable to pay them, even though its creditors may have taken securities from the other company (*k*). In order to replace both companies in their former position, it would be necessary to restore to the transferring company all its assets, and to the company taking the liabilities of the other, all monies paid in discharge of those liabilities. But it does not necessarily follow, from the mere fact that the companies have acted beyond their powers, that they are entitled to be restored to the position in which they would have been, had they never amalgamated; and in a recent case it was held that a com-

2. Where amalgamation is *ultra vires*.

(*d*) See on this subject, *ante*, p. 298 and 610.

(*e*) *Ante*, p. 406 and 469.

(*f*) *Hunt's case*, 1 Hem. & M. 79; *Continental Bank Corporation*, 2 Weekly N. 84. Compare *Carr's case*, 33 Beav. 542, which turned on the terms of the policy and the company's deed of settlement.

(*g*) *Teete's case*, and *Rumney's case*, 4 New R. 48, V.-C. K.

(*h*) *British Provident and Anglo-Australian Insurance Cos.*, 4 New R. 48, V.-C. K.

(*i*) See *Re The Era Insurance Co.*, *Williams's case*, and *The Anchor's case*, 2 J. & H. 400.

(*k*) See *Re The Saxon Assurance Society*, *The Anchor's case*, 2 J. & H. 408. See, too, *Hardinge v. Webster*, 1 Dr. & Sm. 101.

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Div. 1. Sect. 9.

Statute of Limi-
tations.

Laches on part
of creditor.

pany which had taken the assets and liabilities of another, was not entitled to rank as a creditor against that other, in respect of the excess of its liabilities which had been discharged, over its assets which had been taken (*l*).

Debts not barred by the statute of limitations, when carried in before the master or judge, will (if established) be allowed and paid, although no further proceedings may be taken to enforce them until after the lapse of the time which, had they not been carried in, would have sufficed to bar them (*m*). Moreover, as when a company is being wound up, creditors are precluded from suing without leave of the Court, it is questionable whether the statute of limitations does not cease to run as against them.

A solicitor claiming to be a creditor in respect of costs incurred by the company, must submit to have his bill taxed, at the instance of the official liquidator (*n*); but the bill may be allowed as a debt, subject to subsequent taxation (*o*). Where a solicitor's bill had been taxed, and ordered to be paid out of the first funds of the company which should come to the hands of the official liquidator, and the solicitor took no steps to obtain payment for more than six years, and in the meantime the affairs of the company were settled by compromise, it was held that the solicitor was not entitled to have a call made for his payment (*p*). In *Ex parte Forest* (*q*), a debt was due from a company ordered to be wound up. No claim was made by the creditor until more than nine years had elapsed since the debt became due and the winding-up order was made; nor until all the other debts of the company had been paid, and the surplus assets had been distributed amongst the shareholders. The debt was held to be barred by the laches of the creditor, and

(*l*) See *Re The Saxon Life Assurance Society, The Era's case*, 2 J. & H. 408, and 1 De G. J. & Sm. 29. Compare *Wood's Claim and Brown's Claim*, 9 W. R. 366, and 10 ib. 662.

(*m*) *Wryghte's case*, 5 De G. & Sm. 244; and see *Ex parte Higgins*, 2 Jur. N. S. 178; *Warwick and Worcester Rail. Co.*, 27 L. J. Ch.

735; *Gloucester, Aberystwith, &c., Rail. Co.*, 2 Giff. 47.

(*n*) *Ex parte Quilter*, 4 De G. & S. 183.

(*o*) *Terrell v. Hutton*, 4 Ho. Lo. Ca. 1091.

(*p*) *Ex parte A'Beckett*, 2 Jur. N. S. 684. Compare *Gloucester, Aberystwith, &c., Rail. Co.*, 2 Giff. 47.

(*q*) 2 Giff. 42.

by the statute of limitations, the operation of which was held not to have been affected by the winding-up order. Bk. IV. Chap. 3.
Div. 1. Sect. 9.

By the rules and orders issued by the Court of Chancery under the act of 1862, interest on debts allowed is to be computed, as to such of them as carry interest, after the rate they respectively carry. Creditors whose debts do not carry interest are entitled to interest, after the rate of 4*l.* per centum per annum, from the date of the winding-up order; but only out of any assets which may remain after satisfying the costs of the winding up, the debts and claims established, and the interest of such debts and claims as by law carry interest (*r*). It has, however, been decided that, notwithstanding this rule, interest on a debt not bearing interest cannot be allowed at all (*s*) unless the debt is one in respect of which interest in the shape of damages would be given by a jury under 3 & 4 Wm. 4, c. 42 (*t*). Interest.

The Companies act, 1862, makes no distinction between debts; but in substance enacts that all creditors shall be paid *pari passu* (*u*). This, indeed, is subject to the power of liquidators to pay any creditors in full under certain special circumstances mentioned in the act (*x*); but speaking generally, all creditors are to be paid alike; and it has been decided that servants are not entitled to priority in respect of their wages over other creditors (*y*); and that persons paying money into a bank which stops immediately afterwards are in no better position than other persons (*z*). Priorities of
debts.

(*r*) Rule 26. The act is silent on the subject of interest. See 3 & 4 Wm. 4, c. 42, §§ 28, 29; 1 & 2 Vict. c. 110, §§ 17, 18; *Dornford v. Dornford*, 12 Ves. 129; *Mildmay v. Methuen*, 3 Drew. 91.

(*s*) *Ex parte Greenwood*, 9 Jur. N. S. 997, L. C. Westbury.

(*t*) *State Fire Insurance Co., Ex parte Times Insurance Co.*, 2 Hem. & M. 722. In this case the company was being wound up under the act of 1848, but the reasoning applies to companies which are being wound up under the act of 1862.

(*u*) *Ante*, p. 1252, note (*q*).

(*x*) § 159.

(*y*) *Chapman's case*, L. R. 1 Eq. 346. It was held in this case that a compulsory winding-up order operates as a notice of discharge of all the company's servants. *Sed quære*. See *Ex parte Harding*, L. R. 3 Eq. 341, and *Ex parte Finney*, 2 Weekly N. 97, in which the usual notice by the liquidator was held to be necessary.

(*z*) *Ex parte Waring*, 1 Weekly N. 399.

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Div. 1. Sect. 9.

Position of se-
cured creditors.

Although the rules which obtain in bankruptcy do not simply as such apply to the winding up of companies (*a*), it may be questionable whether the secured creditors of a company being wound up ought to be allowed to prove for their whole debts without giving up their securities, provided such securities affect the assets of the company (*b*). It seems difficult to reconcile the right of secured creditors to prove for their whole debt, and at the same time to retain their securities, with the principle that the assets of the company are to be applied *pari passu* amongst all its creditors. To the extent to which the security is deficient the secured creditor is in fact unsecured; and if he retains his security it may fairly be urged that he ought to give credit for its full value, and only prove for the deficiency in competition with the other creditors. It is believed, however, that in practice secured creditors of companies being wound up are allowed to retain their securities and to prove for their whole debts (*c*); this being the rule adopted in equity in administering the estates of persons who have died insolvent (*d*).

Vendor's lien for
unpaid purchase-
money.

The ordinary lien which a vendor of land has for his unpaid purchase-money (*e*), and the right of an unpaid vendor of goods to stop them *in transitu* in the event of the insolvency of the buyer, are both available against companies which are being wound up (*f*).

Debts due to
members.

A debt due from a company to one of its own members in his character of member by way of dividends, profits, or otherwise, cannot be proved against the company in competition with creditors who are not members; but such a debt must be taken into account in adjusting the rights of the members *inter se* (*g*).

(*a*) See *Chapman's case*, L. R. 1 Eq. 346, and *per Turner*, L. J., L. R. 1 Ch. App. 543.

(*b*) See in bankruptcy, *ante*, p. 1162.

(*c*) See *Wright's case*, 14 Jur. 498.

(*d*) *Mason v. Blogg*, 2 M. & Cr. 443; *Bonser v. Cox*, 6 Beav. 84. See the next note.

(*e*) The vendor not being a cre-

ditor at law until a conveyance has been executed, is not entitled in equity to prove for the whole purchase-money, and to retain his security. See *Rome v. Young*, *supra*, 3 Y. & C. Ex. 199, and 4 ib. 204.

(*f*) See as to the lien of a vendor of a patent, *Gore and Durant's case*, 1 Weekly N. 231, M. R.

(*g*) See § 38, cl. 7, and § 101.

But debts due to members not as such, but in respect of matters in which they have acted as strangers, may be proved against the company in competition with other debts (*h*); and where a mutual insurance company registered under 7 & 8 Vict. c. 110, was being wound up under the acts of 1848 and 1849, it was held that the policy holders were entitled to be paid *pari passu* with the other creditors of the company (*i*). By the company's deed of settlement, its funds were alone to be liable to the payment of its debts and liabilities. The policies, moreover, were expressly made payable out of the funds of the company, but a claim by the policy holders to be paid in priority to the general creditors on the ground that the former had, whilst the latter had not, a specific lien on the assets of the company, was disallowed (*k*). It may be taken as now settled that in such cases as these no right of marshalling exists; and that whilst the policy holders can obtain payment only out of the capital and property of the company, other creditors, even although members of the company, are entitled to be paid not only out of such capital and assets, but also, if the company is unlimited, by calls on the solvent members (*l*).

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Div. 1. Sect. 9.

Mutual insurance
companies.

3. *Set off.*

As between a company being wound up on the one hand, and non-members on the other, the ordinary rules as to set off are applicable (*m*); and it is not essential that both debts shall be actually due before the winding-up order (*n*). It has, moreover, been decided that a person who has accepted bills in favour of the company is not entitled to restrain the liquidator from negotiating them before they are due, although the result of such negotiation may be to deprive the acceptor of his right

Set off between
non-members and
the company.

(*h*) *Grissell's case*, L. R. 1 Ch. App. 528, *infra*, p. 1289.

(*i*) *English and Irish Church and University Association Society*, 1 Hem. & M. 79; *State Fire Insurance Co.*, 1 Hem. & M. 457, and 1 De G. J. & Sm. 634; *Professional Life Insurance Co.*, L. R. 3 Eq. 668.

(*k*) *State Fire Insurance Co.*, *ubi supra*. See, also, *Professional Life*

Insurance Co., L. R. 3 Eq. 668.

(*l*) See the cases in the last two notes, which remove the doubts expressed on this point in *Athenæum Life Insurance Society*, Johns. 633.

(*m*) *Anderson's case*, L. R. 3 Eq. 337. See the cases in the next note but one.

(*n*) *Ib.*

Bk. IV. Chap. 3.
Div. 1. Sect. 9.

Buying up debts
in order to set
them off.

Set off between
members and the
company.

to set off against those bills a debt owing to him by the company (o).

It is a common practice for the debtors of a company which is being wound up to buy up bills of the company in order to set such bills off against what the purchasers themselves owe to the company. The legality of this practice has been questioned, and has not yet been settled by decision. The general scope of the Companies act, 1862, is hardly consistent with any device by which one creditor obtains a preference over others after the winding up has commenced; but it is doubtful whether the language of the act is sufficiently clear to defeat the practice in question (p).

The right of a member of a company to set off what is owing to him by the company against what is owing by him in respect of calls, or otherwise, does not depend simply on the general principles applicable to set off, but also on the special enactments contained in § 38, cl. 7, and § 101 of the Companies act, 1862. By reference to these sections, it will be seen—

1. That whether a company is limited or unlimited, money due to a contributory in his character of member, is not to be treated as a debt of the company payable to him in competition with creditors who are not members (q).

2. That where a company is limited no set off whatever is allowed between the company and its contributories, except when their rights *inter se* come to be adjusted (r).

3. That where a company is unlimited, money due to a contributory, not as a member, but on some independent dealing or contract, may be set off as if such money were owing to a person unconnected with the company (s).

4. That in adjusting the rights of contributories *inter se*, monies due to contributories from the company on any account

(o) *Smith, Fleming, and Co.'s case*, and *Gledstones Co.'s case*, L. R. 1 Ch. App. 538.

(p) See the cases in the last note, and see as to the rule in bankruptcy, *ante*, p. 1111.

(q) § 38, cl. 7, and § 101. Observe that the word member is used in § 38, and contributory in § 101.

(r) § 101. But see where the contributory is bankrupt, *Re Duckworth*, 2 W. N. 137. This differs from the rule which prevailed under the acts of 1856–58. See 21 & 22 Vict. c. 60, § 17, and *Garnett and Moseley Gold Mining Co. v. Sutton*, 3 B. & Sm. 321.

(s) § 101.

may be set off against money due from them to the company in respect of calls or otherwise; and that in such cases there is no difference between limited and unlimited companies (*t*). Bk. IV. Chap. 3.
Div. 1. Sect. 9.

The whole subject now under consideration was carefully considered in *Grissell's case* (*u*), in which it was held—1. That a creditor of a limited company, who was also a contributory in it, was not bound to pay the full amount remaining unpaid on his shares before receiving any dividend on his debt; 2. That he was not entitled to deduct the calls made or to be made upon him from his debt and to receive a dividend on the balance; 3. That he was entitled to prove his whole debt, and to receive a dividend on it *pari passu* with other creditors, and was liable, on the other hand, to pay all calls upon him in full as they might be made. It therefore appears that the only right of set-off in such cases is to deduct sums actually due and payable by the contributory from the amount of dividend actually payable to him. Grissell's case.

It is worthy of remark, that § 101, which prevents set-off in favour of the contributories of limited companies only, in terms applies to cases in which a summary order is made upon a contributory for payment of money due by him to the company. If, therefore, a contributory is sued at law by the company acting by its liquidators for a debt due by him to the company, he may possibly be held entitled to avail himself, under a plea of set-off, of a cross debt owing to him by the company. Observations on
§ 101.

SECTION X.—CONTRIBUTORIES.

1. *The list of contributories.*

The persons who, on the winding up of a company, are compellable to pay its debts by contributions amongst themselves, are termed *contributories* (*x*); and one of the first duties of the Court, after making a winding-up order, is to settle the list of contributories (*y*). Who are the persons to be put on the list will be examined presently. With respect to settling List of contribu-
tories.

(*t*) § 38, cl. 7, and § 101.

11 & 12 Vict. c. 45, § 3.

(*u*) L. R. 1 Ch. App. 528.

(*y*) See the Companies act, 1862,

(*x*) This word was introduced by § 98.

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Div. 1. Sect. 10.

the list, it is to be observed—1. That the Court has power to rectify the company's register of members (*z*); 2. That persons who are contributories in their own right are to be distinguished from persons who are contributories as the representatives or as being liable to the debts of others; and 3. That where the personal representative of a deceased contributory is placed on the list, it is not necessary to add his heirs or devisees, although they may be added if the Court thinks fit (*a*).

Settling the list.

It is the duty of the official liquidator to prepare the list of contributories, and to leave it with the judge at chambers (*b*). The list is to be verified by affidavit, but it may, from time to time, be varied or added to, by leave of the judge (*c*). Upon the list being left with the judge, the official liquidator obtains an appointment to settle the same; and it is his duty to give notice in writing of the appointment to every person included in the list, stating in what character and for what number of shares or interest he is included (*d*). Similar notices are to be given when any variation or addition is made to the list (*e*). The notices must be served four clear days before the day appointed for settling (*f*). The result of the settlement of the list is certified by the chief clerk; and certificates may be made from time to time for the purpose of stating the result of the settlement down to any particular time, or as to any particular person or variation (*g*).

A person may be summoned to be sworn and examined in chambers, in order to determine whether he ought to be a contributory or not, although the list may have been already settled (*h*).

Form of lists.

Forms of lists of contributories are given in the schedule to the rules issued under the Companies act, 1862 (*i*).

(*z*) § 98 and § 35.

(*a*) § 99.

(*b*) Rule 29.

(*c*) *Ib.*, and see the forms in the schedule to the Rules, Nos. 24 to 32.

(*d*) Rule 30.

(*e*) *Ib.*

(*f*) *Ib.* See the forms of notice and affidavit of service in schedule 3, Nos. 26 and 27. As to notices

under the older acts, see 12 & 13 Vict. c. 108, §§ 26 and 32, which altered the law as to notices laid down in *Glaholme's case*, 1 De G. & S. 583, and *Hutchinson's case*, *ib.* 563.

(*g*) Rule 31.

(*h*) See *Re The Esgair Mwyn Mining Co.*, 8 W. R. 660, V.-C. W.

(*i*) See Forms No. 24, 29, 31.

Every contributory on the list, and every creditor whose debt or claim is allowed, is entitled to attend the winding-up proceedings at his own expense (*k*); and therefore to attend on the settlement of the list of contributories. The judge, moreover, can appoint persons to represent contributories and creditors to attend the settlement of the list of contributories as well as other matters arising on the winding up (*l*).

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Attendance on
settling list.

With respect to the power to vary the list after it has been once settled, it is to be observed—1. That this can only be done by leave of the judge; and 2. That no time is limited after which he cannot vary it (*m*). It therefore seems that even after a person has been settled on or off the list, and the time for applying to vary the certificate and for appealing has expired, the judge has still power to vary the list if, in his judgment, it ought to be varied. But it need hardly be said that this power is exercised with great caution; and only under special circumstances, and when there are good reasons for not having made the application sooner. It has been decided that the judge is at liberty to review and vary any decision previously made by himself (*n*), even although no fresh evidence is adduced before him (*o*). But it is not competent for him to insert, or exclude from the list, the name of a person ordered on appeal to be excluded or inserted (*p*).

Resettling the
list.

As an instance in which the power to vary and re-settle the list was exercised, reference may be made to *Alexander's case* (*q*). There shares had been transferred, *malâ fide*, by A. to B.; before the facts were known B. was put on the list, and actually attached for non-payment of calls upon him; but that was held not sufficient to prevent A. from being placed on the list after the invalidity of the transfer had been discovered (*r*).

For the form under the older winding-up acts, see 1 De G. & S. 548.

(*k*) Rule 60. See *Bugg's case*, 2 Dr. & Sm. 452, where some of the contributories sought to put on the list a person omitted by the liquidator, and see *infra*, note (*z*).

(*l*) Rule 61. The creditor's representative appointed under 20 & 21 Vict. c. 78, had a right to attend at the settling of the list, *Mexican*

and South American Mining Co., 26 Beav. 172, and see *infra*, note (*b*).

(*m*) Rule 29.

(*n*) *Re Hopkins*, 10 Jur. N. S. 529; *Ex parte Curzon*, 3 Drew. 508.

(*o*) *Crosfield's case*, 4 De G. & S. 338, and 2 De G. Mac. & G. 128.

(*p*) *Ex parte Best*, 1 Sim. N. S. 193, where new evidence was adduced.

(*q*) 9 W. R. 410.

(*r*) For other instances, see the

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Where there are several cases of the same kind, and they have all been determined alike, and one of them is successfully appealed, the decisions in the others will be rectified by the Court below, as a matter of course (*s*).

Power to rectify
the register of
members.

In order to settle the list of contributories properly the Court has power to rectify the company's register of members (*t*).

When a company is being wound up by the Court, the Court, when settling the list of contributories, will rectify the register without any special application for that particular purpose (*u*); but the power to rectify the register cannot, it is conceived, be exercised by the liquidators of a company which is being wound up voluntarily or subject to the supervision of the Court; and where in such cases rectification is necessary the Court must be applied to (*x*).

Appeals, &c.

The practice with respect to certificates settling the list of contributories, and to applications to vary them, and to appeals from orders settling persons on or off the list of contributories, is the same as in other cases (*y*). An appeal from the decision of the judge acting in the winding up, may be made not only by a person who contends that he is wrongly put on, or excluded from the list, and by the official liquidator on behalf of the company, but also by any other contributory (*z*), or (it

cases in the last three notes, and *Ex parte Kelly's Executors*, 9 W. R. 329, V.-C. K., and *Re The Esgair Mwyn Mining Co.*, 8 ib. 660.

(*s*) See *Ex parte Munday*, 31 Beav. 206.

(*t*) See §§ 98 and 35, *ante*, p. 171, and *infra*, p. 1299.

(*u*) See § 98, *Breckenridge's case*, 2 Hem. & M. 642; *Whittet's case*, 2 De G. & J. 577; *Birch's case*, ib. 10.

(*x*) Power to rectify the register may at first sight be supposed to be given by § 133, cl. 8, taken in connection with § 98. But a closer examination of the words of those sections, and of § 35, will, it is conceived, show that this is not so.

(*y*) See § 124 and rule 56, *ante*, p. 1268. Leave to appeal, after three weeks had expired, was given

in *Ex parte Holroyd*, 15 Jur. 696, and in *Ex parte Day*, 3 Jur. N. S. 1016, in both of which cases the appellant had paid calls. In *Ex parte Holroyd*, the appellant was put under terms not to disturb the payment he had made. In *Ex parte Day*, the Court refused to impose any such terms. See also, in connection with this subject, *Holt's case*, 3 De G. & S. 99; *Ashburner's case*, 13 Jur. 691. The application for leave to appeal ought not, it seems, to be made *ex parte*. See *Lama Italian Coal Co.*, 2 W. N. 119.

(*z*) See *Ship's case*, 2 De G. J. & S. 544, where a contributory obtained leave to intervene. See, also, *Blackburn's case*, 3 Drew. 409, and 8 De G. M. & G. 177. In *re Bod-*

is presumed) by any creditor who, under the same act, is a party to the winding up. The question on the appeal being simply whether a given individual ought or ought not to be on the list, it is not requisite to bring before the Court another person who will have to be put on the list, if the individual in question is struck off (a). The usual parties to the appeal are the alleged contributory and the official liquidator (b).

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No person ought to be settled on the list of contributories until his liability to contribute to some debt, liability, or loss of the company being wound up has been ascertained: he ought not, for example, to be put on the list "in respect of any expenditure which he may be proved to have authorised" (c).

No person to be on the list until his liability to contribute is established.

It was at one time thought, that every person who, under any contingency, might become liable to contribute with others to any debt, loss, or liability of the company being wound up, ought to be on the list of its contributories (d); but it was afterwards held under the older acts that, if there were two classes of persons liable to creditors, but one of those classes was bound to indemnify the other against all demands, and this other had no claim to the assets of the company, the persons composing the class secondarily liable ought not to be on the list at all, until it became necessary to put them there, in order that justice might be done as between themselves. The cases in which shareholders were struck off the list, on the ground that they had transferred their shares, or been induced to take them by the fraud of the company, all proceeded upon this principle (e).

As regards persons secondarily liable.

min United Mines, 23 Beav. 385, the official manager contended that a person ought to be on the list; some contributories applied to be heard on the same side, but the Court declined to hear them. See *Re Norwich Yarn Co.* 13 Beav. 428, note.

(a) See *Sanderson's case*, 3 De G. & S. 66; *Hall's case*, ib. 80.

(b) The creditor's representative appeared in *Nicol's case*, 3 De G. & J. 387, but was not allowed to be

heard. In *Ex parte Finlay & Co.*, 27 L. J. Ch. 658, his costs were allowed, and see *ante*, note (l).

(c) *Ex parte Riddell*, 1 Sim. N. S. 402.

(d) *Ex parte Hawthorn*, 1 Mac. & G. 49; *Ex parte Morgan*, ib. 225.

(e) See *Sutton's case*, 3 De G. & S. 262; *Carew's case*, 7 De G. Mac. & G. 43. As to the liability of such persons to be put on the list under the Companies act, 1862, see *infra*.

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Past members.

So, under the Companies act, 1862, past members are only liable to contribute in the event of the present members being unable to discharge their liabilities; and until there is evidence to show that recourse must be had to the past members, they are not put on the list at all (*f*).

2. *Who are contributories.*

General observations.

1. Under acts
of 1848-9.

Under the Winding-up acts of 1848—1849 (*g*), the contributories were—

1. Persons entitled to shares of the assets or accruing profits of the company at the time of the presentation of the petition for winding it up; and,

2. Other persons liable to contribute to the payment of any of the debts, liabilities, or losses of the company.

But with respect to both classes, it was held that the obligation to contribute with others was the real test of liability to be put on the list of contributories. There might, therefore, be shareholders who were not contributories; *e.g.*, shareholders entitled to be indemnified by the company against all losses: and there might be contributories who were not shareholders, *e.g.*, persons who had simply agreed to take shares from the company. Direct liability to creditors was not, however, the test whereby to determine whether a person was or was not a contributory under the acts of 1848—1849: for a person may be liable to creditors, and yet not be liable to contribute with other persons to the payment of those creditors; and a person may not be liable to the creditors at all and yet may, as between himself and others who are liable to them, be bound to contribute with those others to the discharge of the creditors' demands. It was, indeed, occasionally said or assumed by judges of eminence, that liability to creditors was the test of a person's liability to be made a contributory (*h*); but the authorities, and especially the later

(*f*) This practice is warranted by § 38, cl. 3, and § 74.

(*g*) 11 & 12 Vict. c. 49, § 3.

(*h*) See, for example, 1 Mac. & G. 315.

ones (*i*), were clearly opposed to this doctrine, which indeed could hardly be supported, either by reference to the language or to the spirit of the act of 1848: not by the words, for the reasons above mentioned; nor by the spirit, for the main object of that act was to enable companies to be wound up on the principles applied by courts of chancery in winding up an ordinary partnership in a suit for dissolution (*k*).

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The Companies act, 1862, draws a distinction between,

2. Under the
Companies act,
1862.

1. Companies formed and registered under the act, or under the repealed acts of 1856—1858 (*l*).
2. Companies registered under the act, or the acts of 1856—1858, but not formed under it or them (*m*).
3. Unregistered companies (*n*).

1. With reference to companies of the first class, the act declares that the term contributory shall mean every person liable to contribute to the assets of a company under the act in the event of the same being wound up (*o*). In order to ascertain what persons are thus liable, recourse must be had to sections 38 and 76—78, the effect of which is apparently to make the following persons, and those only, contributories in the companies now under consideration, viz.,

1. Companies
formed under
act.

1. Existing members (*p*), *i.e.*, members at the time of the commencement of the winding up (*q*).

2. Past members, who have not ceased to be members for one year prior to the time above mentioned (*r*).

3. The legal personal representatives of such members and past members (*s*).

4. Their heirs and devisees (*t*).

5. Their assignees in bankruptcy (*u*).

6. Their husbands (*x*).

The third, fourth, and fifth classes are only liable to be put on the list in their representative capacities, unless of course

(*i*) See 1 De G. & S. 560, 563;
3 ib. 223, 265; 3 Mac. & G. 187;
1 De G. Mac. & G. 576, and 3 De
G. & J. 421.

(*k*) See *ante*, 1211.

(*l*) See §§ 74 and 176.

(*m*) See §§ 177 and 196.

(*n*) § 200.

(*o*) § 74.

(*p*) § 38.

(*q*) See §§ 84 and 153.

(*r*) §§ 38 and 84.

(*s*) § 76.

(*t*) *Ib.*

(*u*) § 77.

(*x*) § 78.

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they themselves fall within one of the first two classes. As regards husbands, the effect of the act seems to be to make them, during marriage, contributories to the same extent as their wives would have been if they had not married (*y*); but the act only applies to persons marrying women who are members at the time of marriage.

Former members who have ceased to be members for a year or more before the presentation of the winding-up petition are not contributories at all. Former members who have ceased to be members within that time are liable to be made contributories in the event of the existing members being unable to satisfy their contributions (*z*); but even then past members are only liable in respect of debts and liabilities of the company contracted before they ceased to be members (*a*).

Observation on
word "mem-
bers."

From the above remarks it will be seen that in order to understand the exact signification of the term "contributory" as used in § 74, it is indispensable to understand accurately the meaning of the word "member" as used in § 38. To do this, however, will be found extremely difficult; for not only is the description of a member given in § 23 open to the remarks already made upon it in p. 171, but the register, which that description assumes to be correct, is liable to be rectified when the question of contributory or no contributory has to be determined (*b*).

2. Companies
registered but
not formed under
the act.

2. As regards companies registered under the act of 1862, or under the acts of 1856—1858, but not formed under it or them, it seems, 1, that all persons are contributories who come within the meaning of that word as applied to companies formed and registered under the act of 1862; 2, that all other persons are contributories in respect of the debts and liabilities of the company contracted prior to registration, who are liable at law or in equity to pay or contribute to the payment of any of such debts or liabilities, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves in respect thereof, or to pay or contribute to the payment of the costs of winding up, so far as relates to

(*y*) § 78.

(*z*) § 38, cl. 3.

(*a*) Ib. cl. 2.

(*b*) § 98 and 45. See as to this,
ante, p. 171, and *infra*.

such debts or liabilities (*c*). The provisions already noticed respecting representatives, heirs, devisees, assignees, and husbands, also apply to this last class of contributories (*d*). Bk. IV. Chap. 3.
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3. With respect to unregistered companies, the act declares that every person shall be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt or liability of the company, or of any sum for the adjustment of the rights of the members amongst themselves, or of the costs of winding up (*e*). The representatives, heirs, devisees, assignees, and husbands of such persons are also contributories as above (*f*). 3. Unregistered
companies.

Although the above are the main provisions of the Companies act, 1862, bearing directly on the question who are contributories and who not, that question by no means depends solely on the sections referred to. Distinctions be-
tween the Acts
of 1848-9 and
the Act of 1862.

In the first place, it must be borne in mind that creditors of companies registered under the act of 1862, have no remedy against the members individually, except under the winding-up provisions of that act. This circumstance at once goes far to destroy the analogy between contributories under the act of 1862, and contributories under the acts of 1848—1849; for although it might be very proper, under the last-mentioned acts, to hold that liability to creditors was no test of liability to be put on the list of contributories, the same doctrine cannot be applied under the act of 1862 without placing the creditors in a much worse position than the act itself appears to contemplate. So long as a company registered under the act of 1862 is not being wound up, it is for all purposes a corporate body, and its creditors have no rights or remedies against the members individually. But the moment the winding up commences the state of things is different: the body corporate still exists, it is true; but its disintegration has begun; and the members individually come under direct liabilities to creditors. The act of 1862 deprives creditors of those legal remedies Effect of rights
of creditors.

(*c*) § 196, cl. 5. See as to the application of the older authorities to this class of cases, *Luard's case*, 1 De G. & J. 533; *Dixon's case*, 1 Dr. & Sm. 225.

(*d*) *Ib.*, and §§ 74-78.

(*e*) § 200. See the last note but one.

(*f*) §§ 200 and 74-78.

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against members to which creditors might have had recourse under the older acts, and has substituted other and more equitable remedies in their place. But the act of 1862 scarcely warrants the inference that after a winding up has commenced the creditors have no direct rights against the shareholders, that the creditors' rights are still against the company as an aggregate body only, and that registered shareholders cannot be reached by the creditors except through the company itself. It may indeed be said that as companies are incorporated by registration, the creditors *prima facie* have no rights against the members at all; and that the act has given the creditors no rights against the shareholders except such as the company itself may have. But the history of the act, and the state of the law previously to its passing, go far to displace this argument; and indeed various provisions in the act itself—especially those relating to the register of shareholders, to the rights of creditors to obtain winding-up orders, to the effect of such orders, and to the rights of creditors under them—tend strongly to show that the above contention cannot be maintained. At the same time there is very high authority in its favour (g), and it will probably require a decision of the House of Lords to settle the differences of opinion upon this most important point. The tendency, however, of the most recent decisions is strongly in favour of the view here supported; and unless these decisions should be reversed (which the writer submits they ought not), registered members of companies governed by the act of 1862, will be liable to be placed on the list of contributories whatever rights they may have to indemnity, or otherwise, against the company itself (h).

Persons improperly registered.

But a registered member must not be confounded with a person put on the register without any authority. Such a person can only be a contributory, if at all, on the ground that he has ratified his registration. There is a tendency to hold that every person who knows that he is improperly registered, and who takes no steps to have his name removed, impliedly

(g) See *Ship's case*, 2 De G. J. & I. R. 3 Eq. 576; *Chapman's and Barker's case*, ib. 361. See also

(h) *Oakes' case*, and *Peck's case*, *Smith's case*, 2 W. N. 106.

sanctions the retention of his name (*i*); and it is not unlikely that a rule to this effect will ultimately be established. But however this may be, it is plain that a person cannot be a contributory simply because some one may have chosen to register him as a shareholder. Previous assent, or subsequent ratification on his part, must have existed to make him a contributory.

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Another circumstance which renders it important to be careful before relying on the older decisions on the question of contributories, as authorities under the act of 1862, is the power given to the Court to rectify the company's register of members (*k*). This power renders the actual state of the company's register of little or no consequence if it is shown to be wrong; but few questions are more unsettled at present than the circumstances under which the register ought to be considered as wrong, and to be rectified accordingly. The uncertainty which exists upon this important subject arises from a difference of opinion as to the correct interpretation of the 35th section of the Company's act, 1862. Some consider that under this section the register of members may be rectified whenever it can be shown by a person who is on or off that some other person ought, as between themselves, to be in his place (*l*); whilst others consider that the section does not admit of so wide an interpretation, and is confined to the cases specified in its commencement (*m*), viz.,

Effect of power
to rectify the
register.

1. To cases where the name of a person is without *sufficient cause* entered in or omitted from the register;

2. To cases where default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company.

The more restricted interpretation renders the section inapplicable, except where the company fails in discharging the

(*i*) See the cases cited *infra*, under head III. 3.

(*k*) See §§ 98 and 35, and *ante*, p. 171. This power was first conferred by 19 & 20 Vict. c. 47, § 25. See as to mandamus, &c., *ante*, p. 145.

(*l*) *Ward's case*, 2 W. N. 100,

V.-C. M.; and see L. J. Turner's judgment in *Ward and Henry's case*, 2 Weekly N. 113.

(*m*) *Shepherd's case*, L. R. 2, Ch. App. 16; and see Lord Cairns' judgment in *Ward and Henry's case*, 2 Weekly N. 113.

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Alterations in
status after com-
mencement of
winding up.

duty imposed upon it of keeping a proper register; and this has always appeared to the writer to be the true construction of the section.

A third point which it is necessary to bear in mind when applying the older decisions to modern cases, is the power of the Court to sanction the registration of transfers after the commencement of the winding up. This subject will be considered hereafter, when treating of the position of persons who have ceased to hold shares in the company, and it will then be seen that under the older acts, sellers of shares were held to be contributories under circumstances which, if they were now to occur, would render the buyers contributories in their stead.

CLASSIFICATION OF CONTRIBUTORIES.

Having made these general observations, it is proposed to examine the question who are and who are not contributories; and for this purpose it will be convenient to consider—

- I. Shareholders and their representatives;
- II. Persons who are not shareholders, but who have agreed to take shares;
- III. Persons who are not shareholders, and who have not agreed to take shares;
- IV. Persons who have ceased to hold shares;
- V. Persons induced to take shares by fraud.

I. SHAREHOLDERS AND THEIR REPRESENTATIVES.

1. *Duly constituted shareholders.*

All persons who, at the time of the commencement of the winding up of a company (*n*), are duly constituted shareholders therein, are *primâ facie* contributories in it. This general proposition requires no comment. The difficulties which arise relate to the circumstances which are sufficient to rebut their *primâ facie* liability.

(*n*) See *ante*, p. 1250, as to this.

Moreover, it is immaterial whether the persons in question were the original founders of the company, or whether they have become shareholders by a direct allotment of shares to themselves, or whether they have become shareholders by a transfer of shares previously held by some one else.

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In companies formed under the act of 1862, the subscribers of the memorandum of association are members, and liable to be put on the list of contributories, although no shares may ever have been allotted to them, and they may never have been registered as shareholders (o). But shares allotted to the subscribers are *prima facie* allotted in respect of, or include, the shares subscribed for; consequently, unless there are circumstances to rebut this inference, a subscriber's liability is not for the number of shares subscribed for *plus* the number allotted, but only for one of such numbers, or the larger of them if they are unequal (p). At the same time, a person who subscribes the memorandum of association in respect of a certain number of shares cannot, on the winding up of the company, insist that those shares ought to be treated as paid up in full, unless the memorandum, or at least the articles of association, show that the shares subscribed for are to be treated as paid up. An agreement with the promoters to that effect is not sufficient (q).

Subscribers to
the memoran-
dum of associa-
tion.

With respect to scrip companies, *i.e.*, companies the shares in which pass by the delivery of the scrip certificate, he who when the company is ordered to be wound up, is the *bonâ fide* holder of a certificate, and is *bonâ fide* entitled to a share as such holder, is a contributory in respect of such share (r). But as will be seen hereafter, *malâ fide* transfers of the certificates to persons who hold them for the transferors, will not enable the latter to escape from being made contributories (s). If, as sometimes happens, the scripolders are a distinct class

Shares in scrip
companies.

(o) *Evans' case*, 2 Weekly N. 51 & 93.

(p) *Elliott's case*, 1 Weekly N. 342.

(q) *Migotti's case*, 2 Weekly N. 128.

(r) See *Ex parte Grisewood and Ex parte De Pass*, 4 De G. & J. 544;

Finlay's case, 26 Beav. 182; *Barclay's case*, ib. 177; *Shewell's case*, L. R. 2 Ch. App. 387.

(s) *Lund's case*, 27 Beav. 465; *Hyam's case*, 1 De G. F. & J. 75; *Costello's case*, 2 ib. 302. Compare *De Pass's case*, 4 De G. & J. 544. These will be noticed hereafter.

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from the shareholders, not enjoying the same rights, and not subject to the same liabilities, difficult questions arise as to the liability of the scripholders to be put on the list of contributories. A company of this sort has been ordered to be wound up on the petition of a scripholder, but only on his admitting himself to be a contributory. The very fact, however, that this admission was required, shows that the Court was not satisfied that he would have been a contributory without it (*t*).

Holders of fully
paid-up shares.

With respect to holders of fully paid-up shares in a limited company, as they are in no event liable to calls, they cannot be placed on the list of contributories against their own consent; they are entitled to be on in order to share the surplus assets, if any; but if they disclaim all interest in this respect, they ought not to be put on the list (*u*). Shares, it must be remembered, may be fully paid up, not only in money, but in money's worth; and shares which are *bonâ fide* given as paid up, in payment of property transferred to the company, or of services rendered to it, or of other claims against it, must, on the winding up of a company, be treated as paid-up shares (*x*). But shares which are improperly issued as paid up, when in truth they are not so, will be treated as not paid up, unless, perhaps, they are held by *bonâ fide* purchasers for value without notice of the impropriety of their issue (*y*).

Position of persons holding
paid-up and unpaid-up shares.

Where a person is entitled to receive fully paid-up shares, and he applies for shares, and they are allotted to him, questions may arise as to whether these, or any of them, are to be taken as fully paid up or not. Such questions must turn on the intention of the parties to the transaction: but if neither the application nor the allotment alluded to paid-up shares, it would be for the applicant to show that the shares applied for and allotted were other than ordinary shares; *primâ facie* the inference would be that the shares applied for and allotted were intended to be in addition to the paid-up shares (*z*).

(*t*) *Littlehampton Steam Ship Co.*,
2 De G. J. & Sm. 521.

(*u*) See *Anglesea Coll. Co. L. R.*
1 Ch. App. 555, and *ib.* 2 Eq. 379;
Leifchild's case, 1 L. R. Eq. 231.

(*x*) *Ib.*, and see *Currie's case*, 11
W. R. 13.

(*y*) See *Daniell's case*, 1 De G. &
J. 372, and 23 Beav. 568; *Nickoll's*
case, 24 Beav. 639. Compare *Bunn's*
case, 2 De G. F. & J. 275, and *Saunders'*
case, 2 De G. J. & Sm. 101.

(*z*) See *Derham's case*, 2 W. N. 8;
and as to persons signing the me-

In *Derham's case* (a), directors were required to have seventy-five shares as their qualification, and they were entitled to have fifty fully paid-up shares as a remuneration for their services. A person applied for seventy-five shares, which were allotted to him, and he was elected a director; a resolution was also passed allotting fifty fully paid-up shares to each director; the director in question was held a contributory in respect of all the seventy-five shares, although he contended that the fifty fully paid-up shares ought to be deducted from them, and that he consequently ought to be on the list for twenty-five shares only.

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Derham's case.

The same principle which precludes a holder of paid-up shares from being put on the list of contributories against his will applies to all other shareholders upon whom no calls can be made under any circumstances; *e. g.*, foreign ambassadors (b).

Other persons on whom calls cannot be made.

2. *Persons who have not complied with all prescribed formalities, but are precluded from denying that they are shareholders.*

Under this head, it is proposed to consider the position of those persons who, owing to some want of formality, are not in strictness duly constituted shareholders, but who, nevertheless, are shareholders *de facto*, and are precluded from denying that they are shareholders *de jure* also (c). The position of persons who have simply agreed to take shares, and are contributories solely by virtue of such agreement, will be considered afterwards.

Even before there was any power given to the Court to rectify a company's register of shareholders, it was settled that all persons who, when a petition for winding up a company was presented, were estopped from denying that they were shareholders in that company, were also contributories in it, unless they could show good reason to the contrary. It is wholly immaterial whether such persons are or are not properly

Persons estopped from denying that they are shareholders.

morandum of association, *Migotti's case*, 2 Weekly N. 128, *ante*, p. 1301.

(a) 2 Weekly N. 8, L. J.

(b) See *Magdalena Steam Co. v. Martin*, 2 E. & E. 94.

(c) See on this subject, *ante*, pp. 132-141.

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described in the company's register of shareholders (*d*), or whether they are or are not shareholders in the strict sense of the term, and, as such, liable, in the case of an unregistered company, to be sued at law by creditors of the company. The Companies act, 1862, has made no difference in this respect, and the older authorities are still constantly referred to in cases of this description (*e*).

Straffon's Executors' case.

Straffon's Executors' case (*f*) is the leading authority on this head. There the provisions of a company's deed of settlement required that all transfers of shares should be made in a particular manner, with the consent of the directors testified in a particular manner, and that the transferee should execute the company's deed of settlement. It was also expressly declared that no transferee should be entitled to any of the privileges of a shareholder until he had executed the deed of settlement. A Mr. Straffon bought various shares which were, in fact, transferred to him, and in respect of which certificates and dividends were, in fact, given and paid to him. The shares had never been transferred to him in the manner prescribed by the company's deed of settlement; nor had he ever executed that deed. His executors, however, had been returned to the stamp office as shareholders. On the winding up of the company after his death, his executors were made contributories in respect of his shares; it being perfectly clear that, although the prescribed formalities had not been rigorously complied with, enough had been done to estop both the company and Mr. Straffon from denying that he was virtually a shareholder in the company.

Maguire's case.

In *Maguire's case* (*g*) the deed of settlement of a steam packet company provided that every transfer of shares should be executed by the transferor and the transferee, and be delivered to and kept by the company, and be registered; and that, until that was done, the transferee should have no interest

(*d*) *Yelland's case*, 5 De G. & S. 395, and others of that class noticed in the next section.

(*e*) See *Dixon's case*, 1 Dr. & Sm. 225, which arose under the act of 1856.

(*f*) 1 De G. Mac. & G. 576, and 4 De G. & S. 256. See, also, *Dixon's Executors' case*, 1 Dr. & Sm. 225.

(*g*) 3 De G. & S. 31.

in the company. Shareholders were entitled to free passages in the company's boats. A father, who was a shareholder, transferred two shares to his son, in order that he might use the boats passage free; and these shares were registered in the son's name. The son was informed by his father, that arrangements had been made with the company which would enable him, the son, to use the company's boats without payment of passage money; and the son, on sixteen occasions, availed himself of this privilege, and on each occasion signed a ticket, in which he was described as a proprietor, and entitled to a free passage. The son did not, however, know what arrangements his father had made with the company, nor that shares had been transferred into his name. No instrument of transfer had ever been signed by the son, nor was his name on the list of shareholders returned to the Joint-stock registry office. It was, nevertheless, held that he was precluded from denying that he was a shareholder, and that he was a contributory.

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In *Sanderson's case* (*h*) fifty shares in a banking company were sold by the executors of their late owner. The purchaser accepted, and paid for them; they were all transferred to him, and he received from the company certificates for them, and was registered as a shareholder in respect of them. Of the fifty shares, however, five only had been transferred in strict conformity with the company's deed of settlement. The purchaser was, nevertheless, held a contributory in respect of the whole fifty, although the bank stopped payment shortly after the transfer had been effected.

Sanderson's case.

Gordon's case (*i*) is another instance in which a purchaser who had accepted shares, and received a dividend, and notices of meetings, was held to be a contributory, although the shares had never been transferred to him in strict conformity with the company's deed of settlement.

Gordon's case.

These cases are sufficient to show that where a person has acted, and been treated as a shareholder, he will be a contributory, notwithstanding the non-observance of those formalities which, according to the strict letter of the company's deed,

Persons who have been accepted as shareholders, although they have not acted as such.

(*h*) 3 De G. & S. 66, and 3 Ho. Lo. Ca. 698.

(*i*) 3 De G. & Sm. 249.

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ought to be complied with before a person is entitled to share profits, or enjoy the other rights or privileges of a shareholder. But it is not even necessary that the shareholder should have acted as such; it is sufficient, if, having agreed to become a shareholder, he has been accepted as such by the company.

Mayhew's case.

A good illustration of this is afforded by *Mayhew's case* (k). There the regulations of a cost-book mining company required notice in writing of an intended transfer to be given to the purser; and the company's form of transfer stated that no transfer was complete or valid unless entered in the cost-book and acknowledged by the purser. A transfer in the company's form, and executed both by the transferor and transferee, was left by them in person with the purser; but no other written notice of the transfer was given to him, nor did he in any formal manner acknowledge it. He, however, entered the transfer in a book, and transferred the shares in the transfer book. The company was shortly afterwards ordered to be wound up, and the transferee was put on the list of contributories.

Many other cases illustrating the same principle are to be found in the books (l), and some of them will be referred to hereafter, when considering the position of persons who have ceased to hold shares in the company.

Holders of shares
improperly
issued.

The authorities go even further than this, and show that where a company has issued shares which it had no right to issue, the holders of those shares will, nevertheless, be contributories if they have acted, and been treated as shareholders (m). Those who are parties to the issue of such shares,

(k) 5 De G. Mac. & G. 837.

(l) See further on this head, *Leishman v. Cochrane*, 1 Moore, P. C. N. S. 315, where a person was put on the list of shareholders with his consent, although he did not authorise any one to sign the company's deed. *Robinson's Executors' case*, 15 Jur. 438, and on appeal, 2 De G. Mac. & G. 517, where no shares were really taken, but dividends were paid upon them; *Bernard's case*, 5 De G. & S. 283.

Compare *Keene's Executors' case*, 3 De G. Mac. & G. 272; *Brown's case*, 19 Beav. 97; *Henderson's case*, ib. 107, where persons who had transferred their shares irregularly were held contributories.

(m) *Grisewood and Smith's case*, 4 De G. & J. 544; *Hitchcock's case*, 3 De G. & Sm. 92; *Richmond's case*, 4 K. & J. 305; *Worth's case*, 4 Drew. 529; *Barclay's case*, 26 Beav. 177; *Ginger's case*, 5 Ir. Ch. Rep. 174, is opposed to these, but

and who take them, will be contributories in respect of them, whether the company is bound by their acts or not (*n*); and if the shares purport to be paid-up shares, such persons will be treated as the holders of shares not paid up; for, in such a case, the company is not bound either to repudiate the shares altogether, or to recognise them with the incidents with which they were issued (*o*).

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3. *Married women and their husbands* (*p*).

If a company chooses to deal with a married woman as a principal, and not as the agent of her husband, and she, being known to the company to be a married woman, is allowed to become a shareholder in her own right; and if further, by the rules of the company, her husband is not a shareholder in respect of her shares, and she has no separate estate, then, on the winding up of the company, neither she nor her husband will be a contributory. Not the wife, because she is not, either at law or in equity, capable of binding herself by contract; not the husband, because, *ex hypothesi*, he has had nothing to do with the shares or the company, and the latter has not dealt with his wife as his agent (*q*). In *Angas's case* (*r*), a lady known to a company to be married, bought shares, and was accepted as a shareholder in respect of them, without any participation on the part of her husband. He received the dividends, but always as her agent; he attended meetings, and once held a proxy for another shareholder; his name had been placed on the list of shareholders, but this had been done without the knowledge either

Married women
shareholders.

Angas's case.

in that case there was the grossest fraud.

(*n*) See *Robinson's Executors' case*, 2 De G. Mac. & G. 517; *Daniell's case*, 1 De G. & J. 372, and 23 Beav. 568. See, also, *Adam's case*, *Holmes' case*, and *Pritchard's case*, 1 Weekly N. 407. Compare *Davies' case*, 8 Jur. N. S. 951, where membership had neither been constituted nor intended.

(*o*) *Daniell's case*, 1 De G. & J. 372, and 23 Beav. 568; *Nickoll's*

case, 24 Beav. 639. Compare *Bunn's case*, 2 De G. F. & J. 275, where there was nothing but an agreement to take shares on terms which could not be complied with. See, also, *Saunders' case*, 2 De G. J. & Sm. 101.

(*p*) See *ante*, 89 to 91.

(*q*) *Ex parte Rhodes*, 7 W. R. 510.

(*r*) 1 De G. & S. 560. Compare *Luard's case*, *infra*.

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of himself or his wife. He was held not to be a contributory; for, by the rules of the company, he was not a shareholder in respect of her shares.

General liability
of husband.

But, in the absence of such special circumstances as those above mentioned, a husband must, it is conceived be a contributory in respect of shares held by his wife, with his knowledge and consent, although he may not himself have complied with the regulations of the company, so as to render him in strictness a shareholder therein (*s*). And where a man marries a woman who was a shareholder when he married her, and her shares have been allowed to remain in her name, he will be a contributory in respect thereof (*t*). In such a case, moreover, both the husband and the wife ought to be on the list, so that if she survives, her liability may survive also (*u*). As, however, a husband who survives his wife, is not, after her death, answerable for debts incurred by her before her marriage, it follows that a man who marries a female shareholder, but does not make the shares his own, is only liable as a contributory to the debts, losses, or liabilities of the company, arising or incurred during the coverture (*x*).

Separate estate.

If shares are standing in the name of a married woman, and are her separate property, she will be liable to be put on the list in respect of her separate estate (*y*); and her husband will apparently also be a contributory in respect of such shares, unless, as in *Angas's case*, the company knew her to be a married woman, and accepted her as a shareholder, and not her husband.

Luard's case.

The leading authority on this subject is *Luard's case* (*z*). There, a lady was entitled to, and was registered as the holder of, shares in a company, although she had not executed the company's deed. Upon her marriage the shares were assigned to trustees upon trust for her, for her separate

(*s*) It is curious that this point does not appear to have been actually decided.

(*t*) *Burlinson's case*, 3 De G. & S. 18; *Sadler's case*, ib. 36; *White's case*, ib. 157.

(*u*) *Sadler's case*, 3 De G. & S. 36.

(*x*) *Kluht's case*, 3 De G. & S. 210.

(*y*) *Matthewson's case*, 1 Weekly N. 361, and see the next case.

(*z*) 1 De G. F. & J. 533, decided on the acts of 1856-58.

use; but the trustees did not accept the trusts, and the shares remained as before, in the lady's maiden name. The V.-C. Kindersley held, that the lady ought to be on the list of contributories, in respect of her separate estate, and that her husband ought not to be on the list at all. Upon appeal, however, it was held, that the husband and wife ought both to be on the list; he being put on in right of his wife, and she being put on without any qualification in respect of her separate estate. The company was considered not to have had notice of the settlement; but, had it been otherwise, the result would apparently have been the same.

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With respect to companies which are registered under the Companies act, 1862, it is in effect enacted, that if a female contributory marries, either before or after she is placed on the list, her husband shall, during marriage, be liable to contribute to the same extent as his wife would have been liable if she had not married, and he is made a contributory accordingly (a). The writer does not know of any decision on this enactment; but it obviously only applies to men marrying women who are members at the time of marriage; and even in that case the husband's liability as a present member can only attach so long as the shares remain in his or his wife's name. The enactment is silent as to the husband's liability in respect of shares acquired by his wife after marriage; but it seems to render him liable as a present member, if shares, held by his wife before marriage, and then settled to her separate use, are left standing in her name.

Companies act,
1862.

4. *Infants.*

The writer is not aware of any case in which an infant has been put on the list of contributories. Upon principle, however, there does not appear to be any reason why he should not, if it be for his benefit; and this, if there are surplus assets, might be the case (b). Except, however, where it is for an

(a) 25 & 26 Vict. c. 89, § 78.

(b) See *ante*, 86. The 39th section of the act of 1848 (11 & 12 Vict. c. 45, § 39), which enacted that if any contributory were a

minor, he might attend the proceedings in the winding up by his father or guardian, evidently contemplated the possibility of an infant's being a contributory.

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infant's benefit to accept shares, and with them the burdens attaching to them, it is not easy to see how an infant can be held to be a contributory. In the ordinary case of an insolvent company, the infant's shares would be repudiated (c). If an infant fraudulently represented himself as of age, he might perhaps be fixed (d); but nothing short of this can, it is conceived, deprive him of his right of repudiation. Even if he signs the memorandum of association, he would, it is submitted, not be bound (e).

When shares are standing in the name of an infant, it generally happens that they have been taken or transferred by some person desirous of enjoying the benefit of the shares without incurring any obligations in respect of them. It need hardly be observed, that this will not be allowed, and that in all such cases, the persons really entitled to the shares will be held contributories. The cases on this subject fall, however, under another head, and will be considered hereafter (f).

If an infant shareholder does not repudiate his shares either whilst he is an infant or within a reasonable time after he attains twenty-one, he will be a contributory (g); *à fortiori* will he be so if, after attaining twenty-one, he does anything inconsistent with his right of repudiation, *e.g.*, acts as a shareholder, receives a dividend or pays a call. In a recent unreported case, an infant who had applied and paid for shares, and had paid calls, and received dividends, attained his majority one week before the company stopped payment; three months afterwards he was settled on the list of contributories after due notice, but he paid no attention to the notice, and allowed the time for varying the chief clerk's certificate to expire. A call was afterwards made upon him as a contributory, and he then took out a summons for leave to apply to vary the chief clerk's

Shrapnell's case.

(c) See *Reid's case*, 24 Beav. 318.

(d) See *Wright v. Snowe*, 2 De G. & S. 321, and the cases cited *ante*, pp. 86 and 87.

(e) See §§ 11 & 18 of the Companies act, 1862. § 18 renders the infant a member, but does not exclude his right to repudiate.

(f) They are *Reaveley's case*, 1 De

G. & S. 550; *Litchfield's case*, 3 ib. 141; *Hennessey's Executors' case*, ib. 191; *Reid's case*, 24 Beav. 318. Compare *Maxwell's case*, 24 Beav. 321, where a father applied for shares in the name of his son, but was not allowed to execute the company's deed.

(g) See *ante*, pp. 87, 88.

certificate putting him on the list. This leave was granted on payment by the infant of the costs of the application. He then applied to vary the certificate, and to be removed from the list of contributories, and he was struck off (*h*). He had done nothing after attaining twenty-one which could be regarded as an election to take the shares, and his repudiation was held not to be too late.

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5. Trustees and mortgagees.

A trustee who is a shareholder is, like any other shareholder, liable to be made a contributory, and he must look for his indemnity to his *cestui que trust*. The trustee, as between himself and the other shareholders, is bound to contribute with them to the payment of the company's debts; and he therefore, and not the *cestui que trust*, is in ordinary cases the person to be on the list (*i*). Even if the trustee has not complied with all the formalities which ought to have been complied with according to the companies' articles of association or deed of settlement, yet if the shares have been assigned to him and he has accepted them he will be a contributory in respect of them (*k*).

Trustees.

In *Davidson's case* (*l*), a person was induced by the manager of a banking company to allow shares to be placed in his name, upon the understanding, that they were to be the property of the company, and that he should incur no liability in respect

Davidson's case.

(*h*) *Shrapnell's case*, in *Re Barned's Banking Co.*, before Lord Romilly, at Chambers, 24 April, 1867.

(*i*) *Bugg's case*, 2 Dr. & Sm. 452, is the leading case on this point. See, also, *Newry and Enniskillen Co. v. Moss*, 14 Beav. 64; *Wilson v. Keating*, 27 Beav. 121, and 4 De G. & J. 588; *Bunn's case*, 2 De G. F. & J. 275.

(*k*) *Hoare's case*, 2 J. & H. 229; *Drummond's case*, 2 Giff. 189. Compare *Ex parte Scully*, 6 Ir. Ch. 72; and *Hall's case*, 1 Mac. & G. 307, reversing 3 De G. & Sm. 80, where

the trustee had never become, or apparently intended to become, a shareholder, although he had received the dividends on behalf of the lady to whom the shares belonged. This case (as reversed) is one of those in which liability to creditors was assumed to be the test of a person's liability to be a contributory under the acts of 1858-49.

(*l*) 3 De G. & Sm. 21. See, also, *Ex parte Jones*, 27 L. J. Ch. 666, and *Barrett's case*, 10 Jur. N. S. 711, L. J.

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of them. The real object in thus placing the shares was to deceive the public by leading them to suppose that more shares were taken than really was the case. The shares were transferred accordingly. Some of them were sold by the directors and were transferred to the purchasers, and the others which remained unsold were after a time transferred to the managers. On the winding up of the company eight years afterwards, the trustee was made a contributory. This case, which is important in more respects than one, is a strong authority for making trustees contributories; for had the managers and directors been acting within the scope of their authority, the trustee would have been a trustee for the company, and have been entitled to an indemnity from the company against the consequences of his becoming a shareholder.

Mortgagees.
Price and
Brown's case.

So, as regards mortgagees, *Price and Brown's case* (m) shows that a person who holds shares only as a security for a debt, and is known to do so by the directors of the company, is as much a contributory as if he were the absolute owner of such shares.

Cestuis que
trustent.

These cases show that the trustee is a contributory: *Bugg's case* (n) and *Fenwick's case* (o) show that the *cestui que trust* is not a contributory.

Bugg's case.

In *Bugg's case* (n), a person had *bonâ fide* bought shares in the name of his brother, in order that it might not be known that he was himself connected with the company: although there was evidence to show that the trustee was unable to meet the calls upon him, the *cestui que trust* was held not a contributory.

Fenwick's case.

In *Fenwick's case* (p), a father bought shares for his infant son and had them transferred into the name of a trustee. The father was, however, to have the dividends accruing during his son's minority. The Master put the names of the father and of the trustee on the list of contributories in respect

(m) 3 Dr. & Sm. 146; and see *Chapman and Barker's case*, L. R. 3 Eq. 361, noticed *infra*. As to the rights of the mortgagee against the mortgagor, see *Phene v. Gillan*, 5

Ha. 1.

(n) 2 Dr. & Sm. 452.

(o) 1 De G. & Sm. 557.

(p) 1 De G. & S. 557. Compare *Ex parte Scully*, 6 Ir. Ch. 72.

of these shares, but on appeal the father's name was ordered to be removed.

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But although the general rule is that the trustee and not the *cestui que trust* is a contributory, still, a person in whose name shares have been placed without his knowledge or consent, and who has not himself accepted them, cannot be made a contributory in respect of them. *Pim's case* (q) and *Hennessey's Executors' case* (r) may be usefully referred to on this head.

Transfers into
persons' names
without their
authority.

In *Pim's case* (q), there A. transferred into the names of B. and C., without their knowledge or consent, forty shares, bought with trust money. A. died, having appointed B. his executor. B. found the certificates for the shares amongst A.'s papers, and at the request of the directors of the company sent in the certificates to be exchanged. The directors cancelled the forty shares in question for reasons of their own, and transferred forty other shares into the names of B. and C. C. had had no knowledge whatever of these transactions. But it was contended that B. ought to be made a contributory, he having accepted forty shares in the company. It was however held, that having regard to the peculiar circumstances of the case, B. had done nothing to make the shares his own, and that he was not a contributory either in his own individual capacity, or as A.'s executor.

Pim's case.

In *Hennessey's Executors' case* (s) shares were sold by A. to B. the father of C. A., at B.'s request, transferred the shares into C.'s name, and C. was registered by the company as a shareholder. C., however, was no party to this transaction; he never in any way acted as a shareholder; nor was he ever, to his knowledge, treated as such by the company. After he was informed of what had been done, he expressed great dissatisfaction, but did not, apparently, communicate with the company with reference to them. It was held that C. never accepted the shares, and that A.'s executors were, as such, contributories in respect of them.

*Hennessey's Ex-
ecutors' case.*

Again, the rule that the trustee, and not the *cestui que trust*, is a contributory, will not be adhered to where a departure

Dishonest trusts.

(q) 3 De G. & S. 11, and 1 Mac. & G. 201.
& G. 291.

(r) 3 De G. & S. 191, and 2 Mac. & G. 201.

(s) 3 De G. & S. 191, and 2 Mac.

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Cox's case.

from it is required in order to defeat fraud. In a case where a promoter of a company took a number of shares, and placed them in the names of various persons in order to swell the apparent number of shareholders, and so to deceive the public, he was put on the list in respect of all such shares; he was, in fact, treated as holding the shares in various names which he had chosen to assume for purposes of his own (*t*). Whether his nominees were also liable to be put on the list was not decided, but was expressly left open for determination (*u*).

Malâ fide transfers.

Upon the same principle, if a person transfers his shares to a nominee of his own, in order to put the nominee forward in case of reverse, but at the same time to retain for himself whatever advantages may accrue from the shares, the real owner will be treated as himself holding the shares, and will be placed on the list accordingly (*x*). The dishonest purpose of the trust prevents its recognition for the purpose for which it was created.

Holders of shares passing by delivery.

Further, in companies, the shares of which are transferable by delivery of certificates, the person who may happen to hold the certificates for another when the company is ordered to be wound up, is not necessarily the proper person to be on the list of contributories. Whether he is, or is not, depends upon whether he held them as legal owner, or simply as the agent of the person to whom they belonged. This is shown by *Finlay's case* (*y*), which arose in winding up a Scrip company. In this case Messrs. Finlay & Co., who were merchants and bankers, were the allottees and holders of 1455 shares. Of these sixty were their own, and the rest belonged to their customers.

Finlay's case.

(*t*) *Cox's case*, 9 Jur. N. S. 1184, on appeal from the Stannaries.

(*u*) See, as to this, *Barrett's case*, 10 Jur. N. S. 711, and *Davidson's case*, 3 Dr. & Sm. 21, *ante*, p. 1311.

(*x*) *Chinnock's case*, Johns, 714, and others of that class noticed, *infra*.

(*y*) *Finlay, Hodgson, & Co.'s case*, 26 Beav. 182, and 27 L. J. Ch. 664. See, also, *Shewell's case*, L. R. 2 Ch. App. 387. The company had no deed of settlement, and was not in-

corporated. It had a prospectus, which set out the constitution and regulations of the company, so far as it had any. The scrip certificates declared that the holder was (or on making certain payments would be) entitled to a certain number of shares in the company. The certificates passed by delivery, and the holder was treated as the owner. See *Barclay's case*, 26 Beav. 177, where it was contended that the company was altogether illegal.

Messrs. Finlay & Co., however, received all dividends and paid all calls on all the shares, and they did so in their own names, without making any distinction between the shares which belonged to themselves and those which did not. One at least of the directors of the company knew that Messrs. Finlay & Co. held shares as agents merely. It was decided that Messrs. Finlay & Co. were contributories only in respect of the sixty shares which were their own. The shares in this case were transferable by delivery, there was no rule of the company to the effect that trusts should be ignored, and there was therefore, no reason why the *cestuis que trustent* should not be treated as the holders of the shares. It may however be doubted, whether it therefore followed that the agents could not have been treated as the holders; for their principals were undisclosed.

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A person who holds shares in a company as a trustee for that company, is obviously entitled to be indemnified by the company against all losses, unless the transaction in respect of which he holds the shares is *ultra vires*, and not binding on the shareholders (z). It follows from this, that where the transaction is *intra vires*, the trustee ought not to be on the list of contributories except in respect of his liability to creditors; and under the older winding-up acts he would not have been a contributory at all (a). But as regards companies registered under the Companies act, 1862, members are contributories although they may be trustees for the company; their right to indemnity can only be taken into account when the creditors have been paid, and the rights of the contributories *inter se* come to be adjusted. This point was decided by the V.-C. Wood, in *Chapman and Barker's case* (b), where a shareholder in a company borrowed money of it, and transferred his shares to a trustee for the company as a security for the loan. The trustee was put on the list. It may be observed that *primâ facie* the directors of a company have no power to buy up its shares

Trustees for
company.

Chapman and
Barker's case.

(z) In such a case the trustee could be fixed with the shares, whilst his right to indemnity might be repudiated. See *Daniell's case*, 1 De G. & J. 372, and 23 Beav. 568; *Nickoll's case*, 24 Beav. 639. Compare *Saunders' case*, 3 De G. J.

& Sm. 101.

(a) *Saunders' case*, 3 De G. J. & Sm. 101. Observe that there the creditors could not have succeeded at law against Saunders.

(b) L. R. 3 Eq. 361.

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and place them in the names of trustees for the company: to do so is in effect to reduce the capital of the company.

6. *Executors, heirs, and devisees.*

Executors of
deceased share-
holders.

Although the executors of a deceased shareholder may not be themselves shareholders, they will nevertheless be liable to be placed as executors on the list of contributories in respect of the shares held by their testator (*c*). Moreover, an executor is liable to be made a contributory as executor, if his testator was virtually, although, owing to the non-compliance of certain forms, not perhaps strictly, a shareholder (*d*). So, although the shares were such as the company had no right to create (*e*); so, although more than three years have elapsed since the testator's death, and the company is one in which shareholders are not liable to creditors for more than three years after their retirement (*f*); so, although the debts of the company have been incurred since the testator's decease (*g*); so, although the executor swears he has no assets, and has wound up the estate (*h*). Even if a share has been bequeathed and the executor has assented to the bequest, he will still be a contributory in his character of executor, if the legatee has not been accepted by the company as a shareholder in respect of the share in question (*i*). If the executor is himself legatee, he will be a contributory as executor only until he has himself been accepted as a shareholder (*k*).

(*c*) 25 & 26 Vict. c. 89, §§ 76, 99, 105. *Thomas's case*, 1 De G. & S. 579. Executors, though not themselves shareholders, may petition for a winding-up order, *Re Norwich Yarn Co.*, 12 Beav. 366.

(*d*) *Straffon's Executors' case*, 1 De G. Mac. & G. 576; *Dixon's Executors' case*, 1 Dr. & Sm. 225.

(*e*) *Robinson's Executors' case*, 2 De G. Mac. & G. 517, and 13 Jur. 438.

(*f*) *Gouthwaite's case*, 3 Mac. & G. 187.

(*g*) *Blakesley's Executors' case*, 3

Mac. & G. 726, and 13 Beav. 133; *Hamer's Devisees' case*, 2 De G. Mac. & G. 366.

(*h*) *Thomas's case*, 1 De G. & S. 579; *Crosfield's case*, 2 De G. Mac. & G. 128. See *Henderson v. Gilchrist*, 17 Jur. 570, ante, p. 1038.

(*i*) *Keene's Executors' case*, 3 De G. Mac. & G. 272; *Crosfield's case*, 2 ib. 128, and 4 De G. & S. 338; *Hamer's Devisees' case*, 2 De G. Mac. & G. 366, and 3 De G. & S. 279.

(*k*) *Bulmers' case*, 33 Beav. 435.

But if a share is bequeathed and the executor has assented to, and the legatee has accepted the bequest, and the company has accepted the legatee as a shareholder in respect of such share, then the legatee and not the executor is, on the subsequent winding up of the company, the person to be made contributory (*l*); and if an executor applies to the directors to know what shares his testator had in the company, and is told none or a certain number only, and the executor acts upon the faith of this statement and winds up the estate of the deceased, transferring those shares, if any, which according to the statement of the directors, belonged to him, and the company is afterwards wound up, the executor cannot be made a contributory, although his testator may in fact have had shares in the company other than those mentioned by the directors (*m*).

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When executor
not liable.

Effect of wind-
ing up estate of
deceased on the
faith of state-
ments made by
the company.

If a deceased shareholder's personal estate is insufficient to pay his debts, his heir or the devisees of his real estate may be made contributories (*n*). They may be added to the list when it becomes necessary to have recourse to them (*o*).

Heirs and de-
visees of realty.

After the shares of a deceased shareholder have been duly transferred by his executors, they cease to be liable to be made contributories in respect thereof. This will be seen hereafter, when the position of persons who have ceased to have any connection with the company is being considered. It may however here be observed that, unless the constitution of a company warrants the surrender of shares, executors who surrender the shares of their testator do not thereby get rid of their liability to be made contributories (*p*).

Effect of transfer
by executor.

If executors themselves become shareholders, they will be contributories, without reference to the character in which they

Executors be-
coming share-
holders.

(*l*) See the cases cited in the last two notes, and *post*, under the head Retired shareholders. *Crosfield's case*, 2 De G. Mac. & G. 366, and 4 De G. & S. 338, may be referred to with reference to the acceptance of one of several executors as a shareholder. See, too, *Pim's case*, 3 De G. & S. 11.

(*m*) *Meux's Executors' case*, 4 De G. & S. 331, and 2 De G. Mac. & G. 522.

(*n*) 25 & 26 Vict. c. 89, §§ 76, 99, 105. *Hamer's Devisees' case*, 2 De G. Mac. & G. 366, reversing *S. C.*, 3 De G. & S. 279. See *Broughton v. Hutt*, 3 De G. & J. 501, as to setting aside deeds executed by heirs or devisees on the assumption that the shares were real estate.

(*o*) 25 & 26 Vict. c. 89, § 99.

(*p*) *Ex parte Richmond's Executors*, 13 Jur. 727.

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became entitled to the shares taken by them. Thus, where the directors of a company offered reserved shares to the shareholders and the executors of deceased shareholders in proportion to the amount of their original shares, and the executors of a late shareholder accepted some of such reserved shares, but accepted them only in their representative character, they were nevertheless put on the list of contributories in respect of these shares without any qualification (*q*).

Executors, however, do not render themselves personally liable as shareholders by keeping a testator's shares and receiving the dividends until the shares are sold (*r*).

7. *Bankrupts and their assignees.*

Bankrupt share-
holders.

Under the older winding-up acts, it was held that a bankrupt shareholder who had obtained his certificate was not a contributory in the company in respect of losses or debts sustained or incurred before his bankruptcy (*s*); but if there had been subsequent losses, he was a contributory, and liable to calls accordingly (*t*), unless the effect of his bankruptcy was to render him no longer a shareholder (*u*).

(*q*) *Fearnside and Dean's case*, and *Dobson's case*, L. R. 1 Ch. App. 231. See, also, *Spence's case*, 17 Beav. 203, where the executors had purchased shares. Compare *Pim's case*, 3 De G. & S. 11, and *ante*, p. 1313, where the acceptance by the executor was held not to bind him. In *Mallorie's case*, L. R. 2 Ch. App. 181, the applicant was not executor, but acted for him.

(*r*) See *Bulmer's case*, 33 Beav. 435, where the executor was legatee of the shares. See, also, *Armstrong's case*, 1 De G. & S. 565; *Gouthwaite's case*, 3 Mac. & G. 187, and 3 De G. & S. 258; *Doyle's case*, 2 Hall & T. 221; *Hamer's Devises' case*, 2 De G. Mac. & G. 366; *Crosfield's case*, *ib.* 128, and 4 De G. & S. 338. In *Pim's case*, 3 De G. & S. 11, and *ante*, p. 1313, the shares exchanged by the

executor were in no sense his testator's. See the analogous case of assignees in bankruptcy noticed *infra*, note (*e*).

(*s*) *Chapple's case*, 5 De G. & S. 400, *Ex parte Nicholas*, 2 De G. Mac. & G. 271, in both of which the bankruptcy occurred before the company had been ordered to be wound up; *Parbury's case*, 3 De G. F. & J. 80, where the bankruptcy was before the winding-up order. Compare *General Discount Co. v. Stokes*, 17 C. B. N. S. 765, noticed *ante*, p. 1161.

(*t*) See *South Staffordshire Rail. Co. v. Burnside*, 5 Ex. 129.

(*u*) *Greenshield's case*, 5 De G. & S. 599; *Wylan's Steam Fuel Co. v. Street*, 10 Ex. 849. The company, in *Greenshield's case*, was a mere partnership with transferable shares.

A bankrupt member of a company registered under the Companies act, 1862, who has obtained his order of discharge, appears not to be a contributory under any circumstances (*x*); unless indeed he retains his shares and remains a member after his order of discharge, and the company is ordered to be wound up at some subsequent period, in which case his order of discharge would not, it is conceived, protect him (*y*).

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With respect to the assignees, it was held, under the older winding-up acts, that the official manager of a company being wound up might prove against the estate of a bankrupt shareholder for what was due from him as a shareholder to the company (*z*); and that the assignees of a bankrupt shareholder might be made, contributories as assignees (*a*).

Position of the
assignees.

By the Companies act, 1862, the assignees of a bankrupt contributory represent him, and are contributories accordingly, and can be required to admit to proof against his estate what is due from him in respect of his liability to contribute (*b*); and not only calls already made, but the estimated value of those to be made, may be so proved (*c*).

Assignees cannot be made contributories in any other than their representative character, unless they do something to render themselves shareholders (*d*). The payment of calls to preserve the shares from forfeiture, and the receipt of dividends paid in respect of the shares, do not render the assignees liable to be made contributories personally (*e*).

8. *Sellers of shares who have not transferred them.*

This class of persons will be more conveniently considered when examining the position of retired shareholders (*f*).

(*x*) 25 & 26 Vict. c. 89, §§ 75 & 220.
77.

(*y*) See *ante*, p. 1161, 1162.

(*z*) *Ex parte Brown*, 3 De G. & S. 590; *Ex parte Nicholas*, 2 De G. Mac. & G. 271. See 12 & 13 Vict. c. 108, § 30.

(*a*) *Kuper's Association case*, 3 De G. & S. 113.

(*b*) 25 & 26 Vict. c. 89, § 77.

(*c*) *Ib.*, § 75.

(*d*) *Stone's case*, 3 De G. & S.

(*e*) See, as to paying calls, *Stone's case*, 3 De G. & S. 220, and as to receiving dividends, *Armstrong's case*, 1 De G. & S. 565. See, too, *South Staffordshire Rail. Co. v. Burnside*, 5 Ex. 129. See the analogous case of executors, *ante*, note (*r*).

(*f*) See *infra*, under the head, IV. Persons who have ceased to hold shares in the company.

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9. *Persons entitled to be indemnified by the company.*

As to persons entitled to be indemnified by reason of their being trustees for the company, or by reason of some contract binding on the company, see *ante*, p. 1315, and *infra*, under the head II., 2; and as to persons entitled to be indemnified by reason of the fraud of the company, see *infra*, under head V.

II. PERSONS WHO ARE NOT SHAREHOLDERS BUT WHO HAVE
AGREED TO TAKE SHARES.

These must be divided into two classes, viz.—1, persons who have agreed to take shares directly from the company; and 2, persons who have agreed to take shares by transfer from persons who are themselves shareholders.

Transferees of
shares.

With respect to the second class, it has already been seen that transferees of shares who have been accepted by the company as shareholders, are contributories, although they may not have complied with all those formalities which ought to have been observed in the transfer (*g*): and it will be seen hereafter that transferors of shares who have not been accepted by the company as shareholders, were not contributories under the older winding-up acts, and are not contributories under the Companies act, 1862, except in those cases in which there is power to rectify the company's register (*h*).

Allottees of
shares.

With respect to persons who have agreed to take shares directly from the company, it will be convenient to distinguish unconditional from conditional agreements.

1. *Unconditional agreements.*

a) *Allottees of shares in formed companies.*

Agreements to
take shares.

It was not necessary under the Winding-up acts of 1848 and 1849, that a person should have been a shareholder in order that he might be a contributory. If he was bound to the company to take shares in it, that was sufficient to fix him as a

(*g*) *Ante*, 1304-6.

(*h*) See *infra*, under head IV.

contributory⁽ⁱ⁾. The same is true under the Companies act 1862: an agreement with the company to take shares in it, renders a person liable as between himself and the members of the company to contribute to its assets in the event of its being wound up^(k). Indeed nothing remains except registration to render such a person a member of the company in the accurate sense of the word^(l); and this formality can, if necessary, be supplied by the court when settling the list of contributories^(m). In dealing with cases resting on agreement, it is important to distinguish a concluded agreement, whether simple or conditional, from that which is in truth no agreement at all, in consequence of there not being a final assent by both parties to the same terms; at present, however, it is proposed to advert only to those authorities which show that persons who are not shareholders are nevertheless contributories by reason of their having agreed to take shares from the company.

In *Yelland's case* ⁽ⁿ⁾, after a company had been completely registered under 7 & 8 Vict. c. 110, shares were applied for and allotted to the applicant, and he paid the deposit on them. He never did anything else, and not having executed the company's deed, he was not a shareholder. It was, nevertheless, held, that he was a contributory on the winding up of the company.

Allottees of
shares or scrip.
Yelland's case.

In *Hawkins' case* ^(o), a company was formed on the cost-book principle, with a capital of 30,000*l*. By its rules business might be commenced as soon as one-third of that sum had been subscribed, and no person was deemed to be a shareholder until he had signed the rules and been registered in the cost-book. A person applied for shares, which were allotted to him; he paid for them, and received share certificates. He had seen the prospectus of the company, but not its rules, but the certificates referred to them. He never signed the rules, but, having kept the certificates a year without objection, it was held, that his contract to take shares was complete, and that he was a contributory.

Hawkins' case.

(i) See *ante*, p. 1303-7.

(k) See 25 & 26 Vict. c. 89, § 74.

(l) *Ib.*, § 23.

(m) *Ib.*, §§ 98 & 35.

(n) 5 De G. & S. 395, affirmed on

appeal, 16 Jur. 509. See, too, *Cookney's case*, 26 Beav. 6, and 3 De G. & J. 170.

(o) 2 K. & J. 253.

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Allotment made
before the forma-
tion of the com-
pany.

Sharpus's case.

Mansfield's case.

In each of these cases there was a company completely formed when the shares were agreed to be taken. But the principle on which they were decided applies equally where the agreement to take shares has been entered into before the formation of the company. Thus, in *Sharpus's case* (p), and *Mansfield's case* (q), shares in a projected company, with a capital of 100,000*l.*, in 4000 shares of 25*l.* each, were applied for, allotted, and paid for. The company was afterwards completely registered, but only a portion of its capital was ever, in fact, subscribed, and the allottees never signed its deed. They were, nevertheless, held to be contributories. These cases certainly went very far; but there was no misrepresentation as to the amount of capital subscribed, and all that could be said was, that the intended capital could not be raised for the want of sufficient subscribers.

Bird's case.

Bird's case (r) is another of the same class. There, a person who had agreed to take shares was held a contributory, although the company had been registered before the number of shares required by the 7 & 8 Vict. c. 110, to be subscribed, had, in fact, been subscribed for.

Agreement to
take shares need
not be in writ-
ing.

An agreement to take shares need not be in writing; and if a person has verbally applied for shares, and they have been allotted to him, he will have gone too far to retract, and will be a contributory, although he has done nothing more, and has refused to execute the company's deed (s).

No notice of
allotment.

Further, where the application is unconditional in its terms, an allotment pursuant to the application renders the applicant a contributory, even although he may have received no notice of the allotment. Thus in *Bloxam's case* (t), a person applied

Bloxam's case.

(p) 3 De G. & S. 49.

(q) *Ib.* 58, and on appeal, 2 Mac. & G. 57.

(r) 1 Sim. N. S. 47.

(s) *Cookney's case*, 26 Beav. 6, and 3 De G. & J. 170. See *Barton's case*, 4 Drew. 535, and on appeal, 4 De G. & J. 36. See, too, *Ex parte Burton*, 16 Jur. 967; and compare *Smallbone's case*, 14 Jur. 103, in which the evidence of an agreement

to take shares was not satisfactory. As to binding agreements where there has been no allotment, see vol. i., p. 108.

(t) *Bloxam's case*, 33 Beav. 529, aff. on appeal, 10 Jur. N. S. 833. But see *Hebb's case*, 2 W. N. 137, and compare *Shackleford's case*, L. R. 1 Ch. App. 567, *ante*, vol. i., p. 110, where the application was special.

verbally to the secretary of a company for shares in it, and paid the deposit. It was agreed between the applicant and the secretary that if the shares were not allotted in a few days the deposit should be returned. The shares applied for were allotted within a few days, and the applicant's name was inserted in the register of allotments (*u*) in respect of them, and the company stopped business soon afterwards. He was held a contributory although he had had no notice of the allotment, and no shares had been issued to him.

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An agreement to take shares at a future time will not render a person a contributory, if the winding up of the company has commenced before that time arrives (*x*); but if shares are agreed to be taken at once, the person agreeing to take them will be a contributory, although they are not to be paid for until a future day, and the certificates for them are not to be delivered until payment (*y*).

Agreement to
take shares at a
future time.
Barrett's case.

So also in winding up companies in which there are shareholders and scripholders, and in which the scripholders are entitled to become shareholders, but are not bound so to do, it seems that so long as they remain scripholders they are not contributories (*z*). This, however, has not yet been decided.

Scripholders.

In connection with the distinction between agreements to take shares presently and agreements to take shares at a future time, reference may be made to those cases arising under the older Winding-up acts, and relating to the liability of promoters of abortive companies to be made contributories on their winding up.

b) Allottees of shares in contemplated companies.

An abortive company, *i.e.*, an association of individuals engaged in the formation of a company, and not succeeding

Allottees of
shares and scrip
in abortive com-
panies.

(*u*) The report shows that his name was not on the register of members. The Master of the Rolls held that the register of allotments was equivalent to the register. The judgment of L. J. Turner shows that the allotment concluded the contract.

415, and 3 De G. J. & Sm. 30.

(*y*) *Ib.* The case turned on the true construction of the correspondence. See *ante*, vol. i., p. 29 *et seq.*, as to contemplated partnerships.

(*z*) *Littlehampton Steam Ship Co.*, 2 De G. F. & J. 521.

(*x*) *Barrett's case*, 2 Dr. & Sm.

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in their attempts to form it, might be wound up under the acts of 1848 and 1849 (a). But persons engaged in the formation of a company are neither partners nor *quasi*-partners, nor is each the agent of the others for doing that which may be necessary to start the company. Each is answerable for his own acts, and for the acts of others so far as he has authorised them to be done on his credit; but the circumstance that he and others are associated for a common object, does not, *per se*, make them his agents, even for the purpose of attaining that object (b). It follows from this, that if an abortive company is being wound up, a person who has done nothing more than act as a promoter, without rendering himself liable with the other promoters, to third parties, or to those others in respect of liabilities incurred by them, is not a contributory.

Liability of subscribers to contribute.

It was at one time thought that there was an equitable, as distinguished from a legal obligation on the part of every promoter of a company towards the other promoters, to contribute with them towards the discharge of debts incurred by them in the prosecution of their common design; but after some conflict of opinion it may be taken as now clearly settled that a promoter, or subscriber, to an abortive company is not liable in equity to contribute to the liquidation of debts or expenses which have been incurred without his authority, or which he has not agreed to share. Unless, therefore, a person has agreed to share, or has rendered himself directly liable with others to pay, the debts incurred in the attempt to form an abortive company, he will not be a contributory on the winding up of that company (c).

Upfill's case.

The non-liability of a mere promoter of a company to be made a contributory, unless he had done something besides act with others in getting up a company, was established comparatively early; but by a process of reasoning, not readily intelligible, the noble Lord who, in *Norris v. Cottle* (d) so

(a) *Ante*, p. 1217.

(b) See *ante*, p. 33.

(c) See *Norris v. Cottle*, 2 Ho. Lo. Ca. 647, affirming *Ex parte Cottle*, 2 Mac. & G. 185; *Bright v.*

Hutton, 3 Ho. Lo. Ca. 341; *Hutton v. Thompson*, and *Norris v. Cooper*, ib. 161. See, too, *Hamilton v. Smith*, 7 W. R. 173.

(d) 2 Ho. Lo. Ca. 647.

admirably showed the non-existence of an equitable, as distinguished from a legal obligation to contribute to debts contracted without authority, and not subsequently adopted, induced the House of Lords to decide in *Upfill's case* (e) that if a promoter of a company agreed to accept shares in the company when formed, he ought to contribute to the expenses incurred in attempting to form it. It was naturally asked why? How does an agreement by a person to take shares in a company when formed, warrant the inference that he, to any extent, authorises its formation on his credit? It being settled (as it was before *Upfill's case* was decided) that a promoter, as such, was not a contributory, and that an allottee of shares in an abortive company was not, as such, a contributory, no principle remained upon which it could be held that a person who was both a promoter and an allottee must be a contributory. The impossibility of upholding the decision in *Upfill's case* was felt as soon as attention was drawn to it; and although it was followed for a time, it was repudiated by the House of Lords itself in *Bright v. Hutton* (f), which has ever since been the leading authority upon the present subject.

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Many cases had been decided on the authority of *Upfill's case*, and they, of course, fall with it. With reference, therefore, to the subject now under discussion, it is necessary to separate the cases decided before, from those decided after the reversal of *Upfill's case*. But it is to be observed, that cases decided before such reversal, and in which promoters or subscribers were held *not to be* contributories, are still entitled to weight. It is only those which decided such persons *to be* contributories that must now be disregarded.

The following cases must be considered as overruled (directly or indirectly) by *Bright v. Hutton*, 3 Ho. Lo. Ca., 341. Cases falling with Upfill's case.

Upfill's case, 2 Ho. Lo. Ca. 674.

Besley, Ex parte, 2 Mac. & G. 176. This case occurs three times in the books. It was first decided by Vice-Chancellor Knight Bruce

(e) *Hutton v. Upfill*, 2 Ho. Lo. Ca. 674. (f) 3 Ho. Lo. Ca. 341.

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(*Besley's case*, 3 De G. & S. 224), who held that Besley was not a contributory. This decision was appealed against, and was reversed by Lord Cottenham (2 Mac. & G. 176). But the appeal was reheard by Lord Truro, who affirmed the decision of the Vice-Chancellor (3 Mac. & G. 287). The case, as reported in 3 De G. & S. 224, and 3 Mac. & G. 287, is still law.

Bright's case, 1 Sim. N. S. 602. This was reversed on appeal (3 Ho. Lo. Ca. 341).

Brittain, Ex parte, 1 Sim. N. S. 281, decided reluctantly on the authority of *Upfill's case*.

Hole's case, 3 De G. & S. 241, decided on the authority of *Ex parte Besley*, 2 Mac. & G. 176.

Markwell's case, 5 De G. & S. 528, decided on the authority of *Upfill's case*, but after the decision of *Bright v. Hutton*. It cannot, however, be considered law. See *Ex parte Capper*, 1 Sim. N. S. 178, and *Carrick's case*, 1 Sim. N. S. 505.

Morrison, Ex parte, 15 Jur. 346, and 20 L. J. Ch. 296, decided on the authority of *Upfill's case*, and in effect overruled by *Sharp and James's case*, 1 De G. Mac. & G. 565.

Nicholay's case, 15 Jur. 420, decided on the authority of *Upfill's case*.

Sichell, Ex parte, 1 Sim. N. S. 187, decided reluctantly on the authority of *Upfill's case*.

Studley, Ex parte, 14 Jur. 539. This case is very shortly reported, but it seems inconsistent with such cases as *Hall's* (3 De G. & S. 214), *Stock's* (22 L. J. Ch. 218), and *Carrick's* (1 Sim. & S. 505).

Result of authorities.

Upon the principles which are now settled to be applicable to the case of an abortive company, it may be taken :

Subscribers to abortive companies not contributories.

1. That a mere subscriber to or allottee of scrip in an abortive company is not, by virtue of his subscription, or acceptance of scrip, a contributory on the winding up of the company, whether he has paid his deposit (*g*) or not (*h*).

Provisional committee men not contributories.

2. That such a person does not become a contributory by being one of the committee from which the scheme emanates, and by which it is encouraged; or, in other words, by being what is commonly called a promoter of the company (*i*).

(*g*) As in *Maudslay and Field's case*, 17 Sim. 157; *Ex parte Beardshaw*, 1 Drew. 226. See, too, *Ex parte Walstab*, 20 L. J. Ch. 58, where the deposit had been paid and recovered back.

(*h*) As in *Hutton v. Thompson*, and *Norris v. Cooper*, 3 Ho. Lo. Ca. 161; *Ex parte Capper*, 1 Sim. N. S. 178; *Carrick's case*, ib. 505; *Ex parte Hirschel*, 15 Jur. 942. See,

too, the cases in the next seven notes.

(*i*) *Bright v. Hutton*, 3 Ho. Lo. Ca. 341, reversing *Bright's case*, 1 Sim. N. S. 602; *Norris v. Cottle*, 2 Ho. Lo. Ca. 647, affirming *Ex parte Cottle*, 2 Mac. & G. 185. See, too, *Maitland's case*, 3 Giff. 28; *Ex parte Roberts*, 2 Mac. & G. 192, and 14 Jur. 539; *Ex parte Clarke*, 20 L. J. Ch. 14.

This holds, even although he may have subscribed something towards the expenses, if he did so under the erroneous supposition that he was liable for them (*k*), or merely for the sake of peace (*l*); so, although he may have concurred in the appointment of persons, and have incurred liability by so doing, if all liability on that score is at an end (*m*); so, although he may have been party to the appointment of a managing committee, by which debts still unpaid have been incurred (*n*); so, although his name may have been put on that committee, if he never assented to join it, and he never acted on it (*o*).

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3. That, *à fortiori*, subscribers to and promoters of an abortive company are not, as such, liable to be made contributories on its winding up, if they never have, in fact, entered into a binding agreement to take shares. Even before *Upfill's case* was reversed, this proposition was well established (*p*).

À fortiori, subscribers who have not agreed to take shares, are not contributories.

4. That if persons are actively engaged in forming a company, if they act as a body, and as a body incur debts for which they are all liable, if not directly, at all events as between each other, then they form a company or association which may be wound up, and on its winding up they will be contributories, whether they have actually subscribed for shares or not (*q*).

5. That persons who, without being actively engaged in forming a company, agree not only to take shares in it, but

(*k*) *Ex parte Besley*, 3 Mac. & G. 287, affirming *Besley's case*, 3 De G. & S. 224; *Hall's case*, 3 De G. & S. 214.

(*l*) *Ex parte Stocks*, 22 L. J. Ch. 218; *Hall's case*, 3 De G. & S. 214; *Carrick's case*, 1 Sim. N. S. 505; *Ex parte Roberts*, 1 Drew. 204; *Tanner's case*, 5 De G. & S. 182.

(*m*) *Carrick's case*, 1 Sim. N. S. 505; *Ex parte Hight*, 1 Drew. 485.

(*n*) *Tanner's case*, 5 De G. & S. 182.

(*o*) *Ex parte Roberts*, 1 Drew. 204. See, too, *Ex parte Osborne*, 15 Jur.

72. Compare *Spottiswoode's case*, 6 De G. Mac. & G. 345.

(*p*) See *Mathew's case*, 3 De G. & S. 234; *Carmichael's case*, 17 Sim. 163; and *Onions' case*, 1 Sim. N. S. 394.

(*q*) *Norbury's case*, 5 De G. & Sm. 423; *Sharp and James' case*, 1 De G. Mac. & G. 565; *Pearson's Executors' case*, 3 De G. Mac. & G. 241; *Spottiswoode and Amsinck's case*, 6 De G. Mac. & G. 345. See, also, *Bowen and Martin's case*, 20 L. J. Ch. 856, V.-C. K., & *Ex parte Apps*, 18 L. J. Ch. 409.

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Application of
these rules to
modern com-
panies.

also to share the expenses incurred in forming the company, are, on its winding up, liable to be made contributories (*r*).

The writer is not aware of any case having arisen under the Companies act, 1862, and in which the above rules have been adverted to. The reason of this is that registered companies are formed so easily that it seldom happens that promoters incur expenses of any consequence before registration; and there is no recent instance of an order to wind up an unregistered association of promoters of a company. At the same time, such an association, at least if consisting of less than twenty persons, might be legally formed and be wound up (*s*); and if such an event should occur, the principles and rules followed under the older acts would apply; subject, however, to this qualification, that liability to creditors is now a ground for being put on the list, which was not the case under the older acts (*t*).

2. Conditional agreements.

The position of a person who has agreed to take shares upon special conditions is generally one of considerable difficulty. If the conditions have not been assented to by both parties to the agreement, there is in truth no concluded contract. This class of cases will be examined hereafter. For the present, it will be assumed that there is a concluded agreement, but an agreement upon special conditions. Under such circumstances, the first point to determine is, whether the condition is a condition precedent to the person's becoming a shareholder, or a condition subsequent.

Conditions pre-
cedent.

If the condition is precedent, and has not been performed, and its performance has not been waived, the applicant will not be a contributory.

Mainwaring's
case.

In *Mainwaring's case* (*u*), a person applied for shares, but only agreed to take them on being satisfied that the promoters had paid their deposits, and that a sufficient amount of deposits had

(*r*) See the last note.

(*s*) See the Companies act, 1862,
§§ 4 & 199.

(*t*) § 200.

(*u*) 2 De G. Mac. & G. 66. See,
too, *Robert's case*, 3 De G. & S. 205,
and 2 Mac. & G. 192. See, also,
ante, vol. i., p. 109 *et seq.*

been paid to enable the company to obtain an act of incorporation. These conditions had not been, and were not ever fulfilled, and he was held not to be a contributory.

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So in *Austin's case* (x). There a person agreed to become a director provided he was satisfied that a certain amount of capital had been subscribed, and that certain other persons would join the board; his name was published as a director in the prospectus, and he attended one board meeting, and acted thereat as a director; a certain number of shares, necessary to qualify him as a director, were afterwards allotted him; but he declined to accept them, and resigned his seat at the board, finding that the conditions on which he had assented to become a director had not been complied with. He was held not a contributory (y).

Austin's case.

So in *Preston's case* and *Henry's case* (z); *Preston* and *Henry* agreed to take shares on certain terms, and on condition that another person became a director; this he promised to do, but ultimately declined; it was held that they were not contributories, although the agreement with them had been in part performed.

*Preston and
Henry's case.*

The following case was one of greater difficulty, but decided on the same principle. In *Wood's case* (a), Wood agreed to take shares upon condition that he should obtain a contract for the supply of certain goods. The shares were allotted, and Wood was informed thereof, and he was registered as a shareholder. Nothing more was done, and Wood never obtained the contract. The Court held that Wood was not a contributory, first, because the conditions on which alone he agreed to take shares had not been assented to by the company with sufficient distinctness, and secondly, because, even if they had, they were conditions precedent, which had not been performed.

Wood's case.

(x) *Austin's case*, L. R. 2 Eq. 435.

(y) Compare *Munster's case*, 1 W. Notes, 252, where a person became a shareholder on the supposition that a certain other person was a director.

(z) 2 W. Notes, 10.

(a) 3 De G. & J. 85. See, too,

Shackleford's case, L. R. 1 C. App. 567, ante, p. 110, and *Pellatt's case*, 2 W. N. 76 and 121; and compare *Elkington's case*, ib. 112, noticed *infra*, p. 1330, where the order to supply goods was not a condition precedent, or if it were that condition had been waived.

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Conditions subsequent, &c.

Where, however, the condition is not precedent to a person's becoming a shareholder; or where if precedent he has waived its performance, either wholly or for a time subsequent to that at which he is to become a shareholder; or if the so-called condition is not in truth a condition at all, but only an agreement giving rise, in the event of its breach, to a right of action; in all such cases as these, the person who has agreed to become a shareholder will be a contributory, whatever his rights may be by reason of the breach by the company of the condition or agreement.

The following are leading authorities on this head:—

Ex parte Burton.

In *Ex parte Burton* (b), a person was persuaded to apply to an insurance society for an appointment as agent, and also for shares to qualify him for the appointment. His application was apparently acceded to, but before he paid for his shares, or executed the company's deed, he relinquished the appointment, and expressed a desire to relinquish the shares. This, however, he was not permitted to do, and he was held a contributory.

Payment in shares.

Elkington's case.

So where a person agreed to supply the company with goods to the value of 3000*l.*, and to take shares in the company to half that amount in part payment, and to take cash for the residue, and he applied for the shares in the ordinary form, and paid the deposit on them, and they were allotted to him, and he received the certificates and paid the sum required upon the allotment; it was held that he was a contributory in respect of the shares, although no goods were ever ordered or supplied; and although it was contended that the agreement to take shares was conditional upon goods being required (c). *A fortiori* is a person a contributory who actually sells goods to a company and receives shares in part payment, and is registered in respect of them (d). The circumstance that the goods have not been wholly paid for is immaterial (e). Where, however, goods are supplied on the terms that they are to be paid for in

(b) 16 Jur. 967.

(c) *Elkington's case*, 2 W. N. 112, reversing *ib.* 76. Compare *Wood's case*, 3 De G. & J. 85, *ante*, p. 1329, and *Shackleford's case*, L. R. 1 Ch. App. 567, *ante*, p. 110, and *Pellatt's*

case, 2 W. N. 76 and 121, where the Court held there was no acceptance of the conditional offer.

(d) *Gore & Durant's case*, L. R. 2 Eq. 349.

(e) *Ib.*

cash or shares, at the option of the company, and the company stops before any payment is made, it cannot afterwards insist on paying in shares, and so convert its creditor into a contributory (*f*).

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With respect to agreements to take shares in a company upon the terms that no liability shall be incurred in respect of them, the first question which arises is, are those terms binding on the company? if they are not, there is no concluded agreement; and if the person who has agreed to take them on those terms has not, in fact, taken the shares and become a shareholder in respect of them, he will not be a contributory (*g*). If, on the other hand, the terms are binding on the company, there will be a concluded agreement; but as he will, in the case supposed, be entitled to be indemnified by the company against all calls, he can only be put on the list of contributories, if at all, by reason of his liability to creditors. If he has become a shareholder and liable to creditors as such, he will be a contributory (*h*); otherwise he will not. This is shown by those cases arising under the older winding-up acts, and of which *Woodfall's case* (*i*) is a good example. There the promoters of a company agreed to give Woodfall shares in payment for advertisements, and it was distinctly understood between them and him that he should not incur any loss, or be called upon to sign any deed. He took shares and sold them, and was held not to be a contributory, inasmuch as he had contracted with those who, with propriety, might be considered as representing the whole company, that he was to be under no liability.

Agreement to
indemnify.

Woodfall's case.

(*f*) See *Sharon's claim*, 1 W. L. R. 3 Eq. 361, *ante*, p. 1315.
Notes, 231.

(*g*) *Bunn's case*, 2 De G. F. & J. 275, noticed *infra*; and see *Saunders' case*, 3 De G. J. & Sm. 101. Compare *Davidson's case*, 3 De G. & S. 21; *Daniell's case*, 1 De G. & J. 372; and 23 Beav. 568; and *Nickoll's case*, 24 Beav. 639, where the parties were actually shareholders.

(*h*) *Chapman and Barker's case*,

(*i*) 3 De G. & S. 63. See, too, *Mowatt and Elliott's case*, 3 De G. Mac. & G. 254. Compare *Davidson's case*, 3 De G. & S. 21, *ante*, p. 1311, where the shareholder knew very well that the persons with whom he was dealing were doing that which they could have no authority from the company to do on its behalf.

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III. PERSONS WHO ARE NOT SHAREHOLDERS AND HAVE NOT AGREED TO TAKE SHARES.

1. Generally.

Cases in which
a person has
neither become,
nor bound him-
self by agreement
to become, a
shareholder.

By way of contrast with the decisions noticed under the last head, those cases will now be adverted to, in which it has been held, that a person is not a contributory, he not having become a shareholder or agreed to become one, and there being no other grounds on which to hold him a contributory(*j*).

1. No allotment.

1. If shares have been applied for and the deposit on them has been paid, and a receipt has been given for the money, but the shares have never been allotted, the applicant will not be a contributory, although the application may have been, in form, an agreement by him to accept the shares applied for or any less number which might be allotted (*k*). If indeed there is some other evidence clearly showing that the application had been accepted, the fact that there was no formal allotment would, it is conceived, be immaterial.

2. Application for shares re- voked.

2. If an application for shares has been revoked before it has been accepted, the applicant will not be a contributory, although shares may afterwards be allotted to him (*l*).

3. Allotment too late.

3. If an application for shares is not accepted within a reasonable time, a subsequent acceptance will not render the applicant a contributory unless he has assented to it (*m*).

Mathew's case.

In *Mathew's case* (*n*), shares were applied for in the middle of October. No notice was taken of the application until the middle of the following December. Shares were then allotted to the applicant. Nothing more was done. The allotment had not been made *bonâ fide*, with a reasonable expectation that the concern would be carried on, nor was it made within

(*j*) As to cestuis que trustent of shares, see *ante*, p. 1312.

(*k*) *Best's case*, 6 New Rep. 190, L. J., reversing S. C., ib. 16. See *ante*, vol. i. p. 109.

(*l*) *Gledhill's case*, 7 Jur. N. S. 981; *Chapman's case*, L. R. 2 Eq. 567. See *ante*, vol. i. p. 108. In *Hebb's case*, 2 W. N. 137, the revo-

cation was after the allotment, but before notice of it, and this was held sufficient. *Sed qu.* See *ante*, p. 1322.

(*m*) See in addition to the cases cited in the next two notes, *Rams-gate Victoria Hotel Co. v. Montefiore*, L. R. 1 Ex. 109.

(*n*) 3 De G. & S. 234.

a reasonable time after the shares were applied for. It was accordingly held, that the allottee was not bound to take the shares and that he was not a contributory. Bk. IV. Chap. 3.
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In *Carmichael's case* (o), application was made for 100 shares by a person who was willing to become a promoter. No notice of this application was taken for some time, but ultimately he was informed that 100 shares were at his disposal, and he was requested to say how many he would have. He never complied with this request; and, although he had taken an active part in getting up the company, it was held, that he had not entered into any binding agreement to take shares, and that he was not a contributory. Carmichael's case.

Again, if a person applies for shares himself, and they are allotted to some one else, there is no concluded agreement, and he is not a contributory. Thus, where reserved shares were offered to old shareholders and their executors, and a person who was a relative of a deceased shareholder and acted for his executors applied for some reserved shares, and they were allotted to the executors, there being no power to allot them to the applicant himself, it was held that he was not a contributory (p). Applicant and allottee different persons.
Mallorie's case.

4. If shares are applied for, or offered, on terms which are never assented to by both parties to the negotiation, the person applying for them, or to whom they are offered, will not be a contributory in respect of them (q). 4. Terms of offer not assented to.

Several cases have been already referred to which illustrate this principle, but in addition to them it may be useful to notice a few others bearing directly on the subject of contributories.

In *Addinell's case* (r), a circular was sent by the directors of Addinell's case.

(o) 17 Sim. 163. See, too *Onion's case*, 1 Sim. N. S. 394; *Conway's case*, 5 De G. & S. 150; *Sharp and James's case*, 1 De G. Mac. & G. 565; *Roberts' case*, 1 Drew. 204.

(p) *Mallorie's case*, L. R. 2 Ch. App. 181.

(q) *Ante*, p. 109, *et seq.*; *Re Barber*, 15 Jur. 51, where (in substance) 250 shares were asked for, and 100

only allotted, which were never accepted. The common form of application now in use is for a certain number of shares or such smaller number as may be allotted.

(r) L. R. 1 Eq. 225. Compare *Dobson's case*, ib. 231, and *Barrett's case*, 2 Dr. & Sm. 415, and 3 De G. J. & Sm. 30, where the new term was accepted by payment.

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a company to the existing shareholders offering them one reserved share for every five shares held by them, at a certain sum per share, and asking them whether they would take any additional shares if any remained. The shares were to be paid for on the 1st of October. Mr. Addinell, who was a holder of twenty shares, answered the circular, and agreed to take four reserved shares, being one for every five previously held by him, and a certain number of additional shares, if he could have them, on the terms mentioned in the circular. The directors allotted him eight additional shares, and informed him of the fact; adding, that the amount was to be paid on the 1st of October, or the shares would be forfeited. Nothing was paid, and nothing more was done by either party. It was held that as to the four shares originally offered and accepted there was a binding contract, and that Mr. Addinell was a contributory in respect of them: but as to the other four, it was held that he had never assented to the new term as to forfeiture introduced in the last communication from the directors, and that in respect of these shares he was not a contributory (s). The court held, that according to the true construction of the documents, the new term respecting forfeiture did not apply to all eight shares.

Allotment *per se*
not an acceptance of a conditional offer.

Although an allotment of shares, following an unconditional application for them, amounts to an acceptance of such application (t); yet where the application is conditional, a simple allotment is not a sufficient acceptance of the conditions, even if the fact of allotment is communicated to the allottee: and if in such a case there is no other evidence of a concluded agreement except the application and the allotment, the allottee will not be a contributory (u).

5. No acceptance
by proper authority.

5. Again, the conditions must be accepted by those persons who are competent to bind the company by assenting to them.

(s) See, also, *Oriental Steam Co. v. Briggs*, 8 Jur. N. S. 201, noticed *ante*, vol. i. p. 110.

(t) *Ante*, p. 1322.

(u) *Wood's case*, 3 De G. & J. 85, and *ante*, p. 1329; *Shackleford's case*, L. R. 1 Ch. App. 567, noticed *ante*,

p. 110. See, too, *Pellatt's case*, 2 W. Notes, 67 & 121, and compare *Elkington's case*, 2 W. Notes, 112, and *ante*, p. 1330, where the allotment was notified and acted upon by the allottee.

Therefore where a person applied for shares upon certain terms which were assented to by the manager and two directors, when by the constitution of the company three directors were required to bind the company, it was held that the applicant was not a contributory, although the board of directors had delegated the allotment of shares to the manager and the two directors in question (x).

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Howard's case.

It follows from the same principle that, if shares are applied for on certain conditions which it is *ultra vires* for the directors to accept, the acceptance thereof by them does not constitute an agreement binding as between the applicant on the one hand and the company on the other; and if the applicant has not actually become a shareholder he will not be a contributory. For this, *Bunn's case* (y) is the leading authority. There an agreement was entered into between two of the directors of a company and Mr. Bunn to the effect that he should receive certain paid-up shares, transferable by delivery, but that he should not be called upon to execute the company's deed in respect of them; and that he should not as a shareholder be subject or liable to any of the debts or losses of the company; and that if the shares could not be legally vested in him without his executing the company's deed, he should be paid certain sums of money. In pursuance of this agreement, scrip certificates were sent to Mr. Bunn, but he never executed the deed in respect of them: he, however, attended meetings of the shareholders. On the winding up of the company, the Master of the Rolls held him to be a contributory (z); but, on appeal, the decision was reversed, upon the ground that the agreement entered into with Bunn contained a material stipulation that he should not be subject to the debts or losses of the company, and that, as this stipulation was *ultra vires*, and not binding on the company, Bunn was not bound to take the shares. It was further held that his conduct had not been such as to preclude him from insisting upon the invalidity of the agreement

Acceptance
ultra vires.

Bunn's case.

(x) *Howard's case*, L. R. 1 Ch. App. 561. There was no ratification by the board in this case. too, *Davies' case*, 8 Jur. N. S. 951, L. J.; *Saunders' case*, 3 De G. J. & Sm. 101.

(y) 2 De G. F. & J. 275. See, (z) See 6 Jur. N. S. 1175.

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Coleman's case.

with him, and that he was neither legally nor equitably a shareholder (a).

Coleman's case (b) is another illustration of this doctrine. There the directors of one insurance company had resolved to purchase the business of another insurance company, of which Mr. Coleman was the medical officer. He was induced by the managing director of the purchasing company to execute the deed of settlement of that company for 300 shares, upon the faith of a promise that he should become the medical officer of that company, and not be removed except for misconduct. In consideration of the 300 shares and the appointment, he was to give up his shares in the selling company, and to pay 100*l.* to the purchasing company. An entry was made in the books that 300 shares were allotted to him. The stipulation as to the appointment afterwards gave rise to a dispute; and Mr. Coleman insisted that his name should be erased from the list of shareholders, and that his subscription should be cancelled; and he was assured by the managing director that this should be done. Nothing further was done. By the terms of the company's deed of settlement no person became a shareholder unless he had been approved by the directors, and no person taking shares from the company was to be considered as approved by them until he had paid the amount required to be paid upon them, and no person was entitled to rank as a shareholder until he had received certificates for his shares. Moreover, the directors were required to keep a register of shareholders, and that register was to be conclusive to show whether a person was a shareholder or not. Mr. Coleman had not paid anything for his shares, he had not received any certificates for them, nor was his name ever inserted in the register of shareholders. It was held, that the agreement between the managing director and Mr. Coleman was *ultra vires* and not binding on the purchasing company; and that notwithstanding the execution of its deed, Mr. Coleman had never become a shareholder in conformity therewith, and that there was no binding contract

(a) This circumstance distinguishes *Bunn's case* from *Daniell's case*, 1 De G. & J. 372, and 23 Beav. 568; *Nickoll's case*, 24 Beav.

639; and *Davidson's case*, 3 De G. & Sm. 21.

(b) 1 De G. J. & S. 495.

between him and the company that he should become a shareholder. He was accordingly held not to be a contributory (c).

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Again, in *Davies' case* (d), a lady intending simply to deposit money with a bank at interest, paid money into it, and signed and received what the late Lord-Justice Knight Bruce characterised as "papers of an extraordinary description, which would probably have alarmed a man of business if delivered to him, and would have induced such a person to take steps for protecting himself." The papers in effect purported to be (1) an application by her for a certain sum of "investment stock" in the company; and (2) a voucher that she was entitled to such sum therein. Moreover, when on a subsequent occasion she drew out some of her money, she signed a receipt for the sum withdrawn, "for the repurchase of investment stock." The interest on the sum deposited was moreover headed, "Warrant for dividend." By the constitution of the company the directors had power to issue shares in "mutual stock" and "capital stock" of the company; but the so-called "investment stock" differed from each of these, and Mrs. Davies was held not to have become entitled to a share in either of them. There was no power to issue "investment stock" as distinguished from "mutual stock" and "capital stock," and it was clear upon the evidence that Mrs. Davies had never intended to become a member of the company. The Master of the Rolls, nevertheless, thought that she had become a member, and he accordingly placed her on the list of contributories, and stayed an action which she had brought for the recovery of her deposit. But upon appeal this decision was reversed, upon the ground that she had not in fact either become or agreed to become a member (e).

Davies' case.

(c) Lord Westbury also held that even if Mr. Coleman had become a shareholder, the proper inference from the facts would have been that his shares had been forfeited pursuant to the promise of the managing director. The directors had power to forfeit.

(d) 8 Jur. N. S. 951, reversing S. C. ib. 375.

(e) Lord Romilly thought that, under the company's deed of settlement, the depositors were entitled to a share of the profits. The court of appeal thought otherwise: but the report does not clearly show whether the depositors were entitled (in the view taken by the court of appeal) to interest at a fixed rate, or to interest fluctuating with

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6. Applications
on conditions not
performed.

6. An application for shares upon terms not assented to must not be confounded with an application for shares upon conditions which are assented to but are not performed. In the first case, there is no agreement at all; in the second case, there is a concluded agreement, and its effect with reference to the question whether the applicant is a contributory or not, turns mainly, if not entirely, on the nature of the condition, as has been already seen (*f*).

2. *Agreements by directors to qualify themselves.*

Director's quali-
fications.

The cases in which directors ought to have had a certain number of shares as a qualification for their office, and they have acted more or less without qualifying themselves, have given rise to considerable difference of opinion.

No qualification
necessary.

In the first place, mistakes sometimes arise from supposing that a certain number of shares are required to qualify all directors, when in truth the qualification is only necessary with respect to some of them; *e.g.*, for elected directors as distinguished from those originally named (*g*), for town as distinguished from country directors (*h*). Cases such as these turn on the true construction of the company's deed of settlement or articles of association, and not upon any rule relating particularly to contributories.

Qualification
necessary.

Where a qualification is requisite, it might be supposed that no person who, in fact, acted as a director, could be permitted to deny his own qualification; and that he at all events would be a contributory in respect of that number of shares which as a director he ought to have had. But although a director who accepts the shares necessary to qualify him cannot take advantage of any want of formality, and repudiate them on the ground that he never was, properly speaking, a shareholder in respect of them (*i*); yet the authorities show that if a person consents to become a director without knowing

the profits. Probably, however, this was immaterial, for persons who share profits are by no means necessarily partners *inter se*.

(*f*) *Ante*, p. 1328.

(*g*) As in *Stock's case*, 10 Jur. N. S. 812; and *Tothill's case*, L. R. 1

Ch. App. 85.

(*h*) As in *Cotterell's case*, 11 W. R. 13.

(*i*) *Walter's case*, 3 De G. & Sm. 149, affirmed on appeal. 19 L. J. Ch. 501; *Roney's case*, 10 Jur. N. S. 812; *Currie's case*, 11 W. R. 13.

that any qualification is necessary, and he does not, in fact, act as a director, or take any shares, he is not a contributory, although his name may have been inserted in published lists of the directors (*k*). So, if a person agrees to become a director, and to qualify himself on certain conditions, and the conditions not being performed he afterwards resigns and declines to take the shares, he will not be a contributory, although in the interval he may have acted as a director (*l*). Further, if a director knows what the qualification is, and applies for the requisite number of shares, but the application is not accepted, and no shares are allotted to him, and he has never acted or been treated as a shareholder in respect of them by receiving dividends or the like, he will not be a contributory, although he may have acted more or less as a director (*m*).

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And in one case where a person had acted as a director, and had had the requisite number of shares actually transferred to him in order to qualify him, it was held that he was not a contributory; for the shares had been transferred to him by a person who held them as a trustee for the company, and the director in question neither had, nor was intended to have, any beneficial interest in the shares, and had not complied with any of the forms necessary to constitute himself a shareholder according to the company's deed (*n*).

It may be observed that where a director is required to hold a certain number of shares as a qualification, nominally paid-up shares will not suffice (*o*); but all the other shares he holds may be reckoned as qualifying shares (*p*), as may also shares which have been *bonâ fide* paid up and transferred to him (*q*).

(*k*) *Marquis of Abercorn's case*, 8 Jur. N. S. 951; reversing S. C. 10 W. R. 451.

(*l*) *Austin's case*, L. R. 2 Eq. 435, ante, p. 1329.

(*m*) *Tothill's case*, L. R. 1 Ch. App. 85, where there was a resolution that each director should have a certain number of shares, but the director in question knew nothing of this. *Chapman's case*, L. R. 2

Eq. 567; compare *Currie's case*, 11 W. R. 13.

(*n*) *Saunders' case*, 3 De G. J. & S. 101. See, also, *Mather v. National Assurance Association*, 14 C. B. N. S. 676.

(*o*) *Roney's case*, 10 Jur. N. S. 812; *Derham's case*, 2 W. N. 8.

(*p*) *Currie's case*, 11 W. R. 13.

(*q*) *Ib.*

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3. *Variations between the objects of the company as formed and as projected.*

A most difficult class of cases arises where an application for shares is followed by an allotment, but there has been in the interval some change in the nature or objects of the company. If this change is material, the allotment is no acceptance of the application, and the allottee can, at his option, accept or repudiate the shares (*r*). If, knowing the facts, he does not repudiate them, he in effect accepts them, and he becomes a contributory. If, on the other hand, he repudiates them in time, he is not a contributory. But whether his option to accept or repudiate continues until he knows the facts; or whether it must be exercised, if at all, as soon as, with reasonable diligence, he might have known them, is by no means clearly settled. If the latter doctrine prevails, and there is strong authority for it (*s*), then it will follow that as every person can obtain a copy of a company's memorandum of association, an applicant for shares in a projected company who neglects to inform himself of the nature and objects of the company when it is formed, and in which shares have been allotted to him, will not escape from being a contributory by proving that the company as formed is materially different from that which he agreed to join. The cases, however, upon this subject require notice in some detail.

The following are instances (under the older Winding-up acts) of persons who were held not to be contributories by reason of a change in the nature and objects of the company.

Cox's case, and
Naylor's case.

Cox's case and *Naylor's case* (*t*); persons who had taken shares in a company, the liability of the members of which was limited, were held not to be contributories in a company, the liability of the members of which was unlimited. The constitution of the company had been fraudulently altered, and they had not acquiesced in the alteration.

(*r*) See, on this subject generally, 2 W. N. 28, 74.
ante, vol. i. pp. 111 *et seq.*

(*s*) See *Lawrence's case*, L. R. 2 Ch. App. 412; *Wilkinson's case*,
(*t*) 4 K. & J. 308 & 314, cited in *Richmond's case*. Compare *Sheffield's case*, Johns. 451.

Goldsmid's case (u). *Goldsmid* took, and paid for shares in a projected steam-packet company. The directors afterwards determined to abandon the scheme, and to join a company already existing; and at a general meeting of the shareholders of the projected company, it was resolved unanimously that the new scheme should be substituted for the old one, and that the capital originally contemplated should be doubled. At this meeting *Goldsmid* was present; he did not approve of the proposed departure from the original scheme, but he did not actively oppose it: he, in fact, remained passive, and never did anything more; and two years after the meeting referred to, his shares were cancelled. He was held not to be a contributory.

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Goldsmid's case.

Meyer's case (w) was the case of another allottee of shares in the same projected company. He originally had ten shares: he did not accede to the change in the scheme, but ultimately he took one share in the new company, and nine out of the ten shares which he originally agreed to take, were cancelled. He was held not a contributory in respect of these nine shares.

Meyer's case.

Rye's case (x), *Blackburn's case*, as decided by V.-C. Kindersley (*y*), *Ship's case (z)*, *Stewart's case (a)*, and *Webster's case (b)*, which have been already referred to, and *Nichol's case (c)*, which will be noticed presently, further illustrate the same principle, and are all instances in which applicants for and allottees of shares were held not to be contributories in consequence of a change in the nature of the company between the application for the shares and their allotment. The last four of these cases were decided under the acts of 1856 and 1862.

Other cases.

In all the above cases the shares had been applied for before the memorandum of association was registered. Where this is not the case, *i.e.*, where a person applies for shares in

No change since the application.

(*u*) 16 Beav. 262.

(*w*) 16 Beav. 383.

(*x*) 3 Jur. N. S. 460, *ante*, p. 112.

(*y*) 3 Drew. 409 reversed on additional evidence 8 De G. Mac. & G. 177. See the case, *ante*, 118.

(*z*) 2 De G. J. & Sm. 544, and *ante*, 112. N.B.—In this case, Ship

applied for shares in one company, and was allotted shares in another company, there having been two memoranda of association.

(*a*) L. R. 1 Ch. App. 574, *ante*, 112.

(*b*) L. R. 2 Eq. 741, *ante*, 112.

(*c*) 2 W. Notes 77, *infra*, p. 1342.

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a company which is formed, and they are allotted to him, he will be a contributory, although the objects of the company as formed are more or less different from those mentioned in the prospectus, and although he may have applied for the shares on the faith of the prospectus (*d*). In the case now supposed a definite thing is applied for, viz., a share in the existing company, and that thing is supplied; the contract therefore is complete, and can only be impeached, if at all, on the ground of fraud (*e*).

Delay in repudiation.

Upon the subject of delay in repudiation the following are the leading authorities.

Stewart's case.

In *Stewart's case* (*f*), the application to be removed from the list was successful although twelve months had elapsed since the allotment of shares, and the allottee had in the interval tried to sell them, and had attended a meeting called for the express object of altering a clause in the articles relating to the increase of capital beyond the amount stated in the prospectus: but both the V.-C. Wood and the Court of Appeal held that these circumstances did not preclude the shareholder from having his name removed, it being clearly proved that he, in fact, knew nothing of the great change which had been made in the objects of the company (*g*).

Webster's case.

In *Webster's case* (*h*), which was another in the same company, the allottee had exchanged the banker's receipt for a certificate that he was the proprietor of fifteen shares "subject to the provisions of the memorandum and articles of association:" but even this and the lapse of one year after the allotment, and ten months after the receipt, were held not to deprive him of his right to be removed.

Nichol's case.

Nichol's case (*i*). A prospectus of a projected company stated (in effect) that its objects were to rear poultry, and to enable consumers to buy eggs and poultry at half the usual price. The prospectus stated that the articles of association might be seen at

(*d*) See, as to this, *Hallows v.* 120.

Fernie, 2 W. N. 53; *Dixon's case*, ib.

(*g*) Compare *Briggs' case*, L. R. 1 Eq. 483.

(*e*) As to which, see *infra*.

(*h*) L. R. 2 Eq. 741.

(*f*) L. R. 1 Ch. App. 574, *ante*,

(*i*) 2 W. Notes, 77.

112. See, too, *Neill's case*, 2 W. N.

the company's office; but neither the prospectus nor the articles referred to the memorandum of association. On the faith of this prospectus, application was made by Nichols for shares, and they were allotted to him. Shortly afterwards the company was registered, and by its memorandum of association its objects were stated to be not only to rear poultry and deal in poultry and eggs, but also "the dealing in game and wild birds, the cultivation and growth of vegetables, fruit, and agricultural produce, the acquisition, use, or sale of inventions for artificial hatching, the preservation of poultry or meat, and any other purpose connected with the business of the company, and the carrying on the businesses of poulterers, egg merchants, dealers, market gardeners, and farmers." Nichols took no part in the proceedings of the company, and did nothing whatever except pay for the shares on allotment. A year after the allotment he, for the first time, became acquainted with the objects of the company as formed, and he at once repudiated his shares. The V.-C. Wood removed his name from the register of shareholders, being of opinion that there was nothing to put Nichols on inquiry, and that under those circumstances the time which had elapsed since the allotment of shares was immaterial.

On the other hand, where a person knowing the change of the objects of the company delays to repudiate his shares, he will be treated as electing to hold them, and any subsequent attempt to repudiate them will be unsuccessful; and a delay of four months has been held fatal, even although during that time the shareholder had done nothing which was inconsistent with his repudiation (*k*). It need hardly be observed, that if after knowledge of the facts entitling a person to repudiate his shares he acts as a shareholder, *e.g.*, by attending meetings, paying calls, or attempting to sell his shares, his right to repudiate them will be at an end (*l*). Further, if a shareholder knowing of one ground of variance, or having his suspicions aroused chooses to remain quiet, it will be too late for him

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Repudiation too late.

(*k*) *Lawrence's case*, L. R. 2 Ch. 74.
App. 412; *Kincaid's case*, *ib.* See,
also, *Paige's case*, 2 W. Notes, 98,
and *Wilkinson's case*, 2 W. N. 28 &

(*l*) See *Davis's case*, 1 W. N. 363,
affirmed *ib.* 406; *Brigg's case*, L. R.
1 Eq. 483.

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afterwards to repudiate his shares, and he will be a contributory (*m*). *A fortiori* will delay be fatal after the right of the shareholder to repudiate his shares is denied (*n*).

IV. PERSONS WHO HAVE CEASED TO HOLD SHARES IN THE COMPANY.

General observations.

Late shareholders.

The liability of those who are shareholders, and of those who are bound to take shares, at the time of the commencement of the winding up having been now examined, it is necessary to advert to the position of persons who would be contributories if they had not ceased to hold their shares before the time in question.

The liability of a retired member of a company to be placed on its list of contributories depends primarily on the effect of the retirement as between himself and the other members, and secondarily on its effect as between himself and the creditors of the company.

The extent to which a member of a company who leaves it gets rid, as between himself and the other members, of his obligations to contribute with them to the discharge of the debts and liabilities of the company depends theoretically on the constitution of each particular company. Practically, however, it will be found that, as a general rule (*o*), a member of a company, whose shares have been duly transferred, surrendered, or forfeited, is discharged, as between himself and the other members, from all liability as well in respect of past as of future transactions. The acceptance by the company of the transfer or surrender, or the declaration by the company of the forfeiture, being, generally speaking, equivalent to a release by the company of the member whose shares are thus dealt with, from all liability in respect of them. Where this is the case,

(*m*) *Whitehouse's case*, L. R. 3 Eq. 790; *Jopp's case*, 2 W. N. 121; *Clavering's case*, 2 W. N. 130.

Dixon's case, ib. 53. (*o*) There are exceptions, as in *Helby's case*, L. R. 2 Eq. 167, and others of that class, noticed *infra*.

(*n*) *Taite's case*, L. R. 3 Eq. 795;

he is not liable, on the subsequent winding up of the company, to be put on the list of contributories with the present members; and his liability to be put on the list at all can only arise from some necessity of having recourse to past members in order to pay the debts of the company or to adjust the rights of such members *inter se*.

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Under the Winding-up acts of 1848 and 1849, the liability of a late shareholder to be made a contributory depended upon the simple question whether he had, as between himself and the company, got rid of the obligations which, by supposition, he was once under. If he had, he was not a contributory with the existing members, whatever his liability to creditors might have been; whilst if he had not, he was a contributory, although he might have been under no liability to the creditors at law (*p*). But there might be, and, in fact, there usually were, a considerable number of retired members who, although not liable to contribute with the existing shareholders, were, as between themselves, liable to contribute to the payment of those debts which were enforceable against them at law, and which the existing shareholders were unable to discharge. The question then arose whether these transferors ought not to be contributories, seeing that they might be ultimately called upon to defray debts of the company, although they were entitled to be indemnified against such debts by the existing shareholders. This question was formerly answered in the affirmative (*q*); but the later practice was not to make such persons contributories until it actually became necessary to do so, in order to prevent one or more of them from bearing more than his or their share of loss. In other words, retired shareholders were not placed on the list of contributories simply because they might possibly be called upon to make good losses which, as between themselves and the existing shareholders, ought to be borne by the latter (*r*). Before the retired

Under the Acts
of 1848 and
1849.

(*p*) See *Gouthwaite's case*, 3 Mac. & G. 187; *Stirling's case*, 6 Ir. Ch. 180, and the cases in the next two notes.

(*q*) *Hawthorn's case*, 1 De G. & S. 571, and on appeal, 1 Mac. & G.

49. The transfer took place within, and not (as stated in the marginal note in 1 De G. & S. 571) more than three years before the winding up of the company.

(*r*) *Sutton's case*, 3 De G. & S.

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shareholders could be made contributories, it had to be shown that there was some necessity for putting them on the list for the purpose of equitably adjusting these claims against each other (*s*).

Under the Companies act, 1862.

The same rules are applicable to companies which are wound up under the Companies act, 1862, but are not formed and registered under it; for although by that act liability to creditors is of more importance than formerly (*t*), yet, as between past and present members, the present members must contribute to the full extent to which they are liable before recourse can be had to those who had retired from the company before the winding up began. Moreover, a member who has retired before registration ought not to be on the list of contributories of the registered company (*u*).

Companies formed and registered under the act.

The position of retired members of companies formed and registered under the Companies act, 1862, is defined by § 38. Persons who have ceased to be members twelve months before the commencement of the winding up are not liable to be put on the list at all; whilst persons who have ceased to be members less than twelve months before that time are liable to be put on the list; but only as past members (*x*). Moreover, as past members are not liable to calls until it is shown that the existing members are unable to satisfy their contributions (*y*), it is not the practice to put past members on the list of contributories until the necessity for making calls upon them can be proved.

Irregular retirement.

It has already been seen that, where a person has, in fact, become a shareholder, he is a contributory, although all prescribed formalities may not have been observed (*z*). On similar principles, where a person has, in fact, retired from a company, he will not be a contributory (at least as a present member), although his retirement may have been somewhat irregular in

262; *Holme's case*, 4 ib. 312, and 2 De G. Mac. & G. 113; *Ex parte Stirling*, 6 Ir. Ch. Rep. 180.

(*s*) Compare the cases in the last two notes, and observe that in *Hawthorn's case* the transferor was made a contributory at the instance of a person in the same position as

himself.

(*t*) See *ante*, p. 1297.

(*u*) See *Lanyon v. Smith*, 3 B. & Sm. 938, *ante*, 1259.

(*x*) As to which, see § 84.

(*y*) § 84, cl. 3.

(*z*) *Ante*, p. 1303.

point of form (a). But this proposition assumes that the shareholder had the right to retire; and that his retirement would have been unimpeachable if certain prescribed formalities had been duly observed. Where this is not the case, the retired member will, in point of law, be a shareholder still; and will be liable to be made a contributory accordingly, as a present member, subject only to the question whether there is any statutory or other limit of time, after the lapse of which the retirement cannot be called in question. Statutory limit there appears to be none, unless it be twenty years (b); but *Brotherhood's case* (c) is a strong authority for the proposition that where a person has retired *bonâ fide* and openly, the equitable doctrines of laches and acquiescence ought to be applied against a company, and preclude it from disputing the validity of the retirement (c).

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Effect of lapse
of time.

Having made these preliminary observations, it is proposed to consider the liability, to be put on the list of contributories, of—

1. Persons who have transferred their shares to others.
2. Persons who have surrendered their shares to the company.
3. Persons whose shares have been forfeited.

1. *As regards persons who have transferred their shares to others.*

In considering the position of a person who has parted with his shares to another, two classes of cases must be distinguished from each other: viz., 1, cases in which the transferee has actually been substituted by the company for the transferor; and 2, cases in which there has been no such substitution.

(a) Upon the application to such cases of the maxim, *omnia præsumuntur rite esse acta*, the following cases are particularly instructive: *Lane's case*, 1 De G. J. & Sm. 504; *Knight's case*, L. R. 2 Ch. App. 321; *Woollaston's case*, 4 De G. & J. 437.

act, 1862; *Helby's case*, *Stoke's case*, and *Horsey's case*, all in L. R. 2 Eq. 167.

(c) 31 Beav. 365, and 8 Jur. N. S. 926. See, also, *Hunt's case*, 32 Beav. 387; *Smallcombe's case*, L. R. 3 Eq. 769. See *ante*, pp. 726 and 903.

(b) See § 72 of the Companies

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a) *Where the transferee has been accepted by the company in the place of the transferor.*

Transferors of
shares when not
contributories.

If a person has *bonâ fide* transferred his shares to another, if the transferee has accepted the transfer, and if he has been accepted by the company as a shareholder in respect of those shares, then, on the subsequent winding up of the company, the transferee, and not the transferor, is the person to be made a contributory in respect of the shares transferred.

Cape's Executors' case.

A leading case on this head is *Cape's Executors' case* (d), in which it was held that the purchaser of shares in a banking company governed by 7 Geo. 4, c. 46, was liable as a contributory, as well in respect of debts contracted *before* as in respect of those contracted *after* he became a shareholder. It was considered that, in the absence of any special provisions in the company's deed to the contrary, the purchaser took the shares as they stood, subject to the state of the concern at the date of his purchase. This may safely be taken to be the general rule; and it follows from it that, as between the company, the buyer, and the seller, the seller, when he transfers his shares, transfers his liability to be made a contributory.

Other cases.

Several cases which have been before noticed on other points, may be again referred to as showing that a purchaser of shares is a contributory, if he has accepted them, and been accepted as a shareholder in respect of them, although they may not have been transferred in strict conformity with the company's deed of settlement or regulation (e). The same

(d) 2 De G. Mac. & G. 562, affirming the decision of the Master of the Rolls, 16 Jur. 787. See, too, *Holme's case*, 2 De G. Mac. & G. 113; *Mahew's case*, 5 De G. Mac. & G. 837.

(e) *General Floating Dock Co.*, 2 W. N. 27; *Meux's Executors' case*, 2 De G. Mac. & G. 522; *Straffon's*

Executors' case, 1 De G. Mac. & G. 576; *Sanderson's case*, 3 De G. & S. 66, and 3 Ho. Lo. Ca. 698; *Gordon's case*, 3 De G. & S. 249; *Walter's case*, 3 De G. & S. 149. Compare the cases cited, *infra*, p. 1354-6, where the transferee had not been accepted by the company in the place of the transferor.

rule holds good in the case of a *bonâ fide* transfer without value (*f*). Bk. IV. Chap. 3.
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The proposition that in such cases the transferor is not a contributory, is established indirectly by the authorities alluded to, and more directly by others, of which the following are the most instructive.

Croxton's case (g). There the deed of settlement contained words which it was contended continued the transferor's liability in respect of debts incurred before the transfer. But it was held that on the true construction of the deed, he was, as between himself and the company, released from all liability in respect of the debts of the company, although not from his liability, if any, in respect of calls, penalties, and forfeitures previously incurred by him to the company. Croxtton's case.

Again, in *Orpen's case (h)*, where a shareholder in a company governed by 7 & 8 Vict. c. 110, transferred his shares after a call had been made but before it had become payable, he was held not to be a contributory, although the directors had neglected to return the transfer to the registrar of joint-stock companies as they ought to have done. Orpen's case.

Nicol's case (i). There the deed of settlement of a company provided that the shares might be transferred with the consent of the directors, but that seven days notice in writing of a proposed transfer should be given them, and that the transfers should be registered, and that an endorsement of the registry should be made on the deed of transfer, and that such endorsement should be sufficient evidence of their consent. A shareholder sold his shares through a broker, to a person who, in fact, bought them for the company. The seller, however, was not aware of this fact. The names of the seller and the buyer were sent to the company's office, and were there inserted in a transfer in proper form which was afterwards executed by the seller and returned to the company. The Nicol's case.

(*f*) *Maguire's case*, 3 De G. & S. 31; *Fenwick's case*, 1 De G. & S. 557, noticed *ante*, pp. 1304 and 1312. Compare *Hatton's case*, 8 Jur. N. S. 380, V.-C. W. *infra*, p. 1351.

(*g*) 1 De G. Mac. & G. 600, affirming S. C., 15 Jur. 892. (*i*) 3 De G. & J. 387. See, too, *The General Floating Dock Co.*, 2 W. N. 27.

(*h*) 9 Jur. N. S. 615, V.-C. K.

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buyer did not execute it, nor did he, in truth, know any thing about this particular transaction. But he had authorised the purchase of shares by the company in his name, and it was held that he could not repudiate the use which had been made of his name. The company paid for the shares, but the transfer was not registered, and there was no endorsement on the deed of transfer, and no formal assent by the directors to the transfer was ever given. After the transfer, however, dividends were declared, and these dividends were received by the company, the warrants for them being made out to the manager of the company. It was held, that under these circumstances the consent of the directors to the transfer must be inferred to have been given, and that the transferor was not a contributory.

Transfer made
to avoid lia-
bility.

Moreover, the fact that the transfer has been made to a man of straw simply to avoid liability makes no difference (*k*).

In *Hyam's case* (*l*), Lord Campbell threw some doubt upon this doctrine; but, notwithstanding his Lordship's remarks, it seems to be settled that, where the transfer is a real transaction, it will stand, although the transferor's sole object in making it may be to get rid of liability (*m*).

Malâ fide trans-
fers.

But such transfers are naturally viewed with great suspicion, and if there is any doubt as to whether the transferor has *bonâ fide* parted with all his interest in the shares the transfers will be treated as invalid. The following are the leading cases on this head.

Lund's case.

In *Lund's case* (*n*) a holder of 100 shares, of 10*l.* each, in an insolvent company, sold them all to one of his servants for half-a-crown. The shares passed by delivery, and it was not necessary that the purchaser should be accepted as a shareholder by the company. The sale was held to have been made *malâ fide*, and the seller was held to be a contributory.

Hyam's case.

Hyam's case (*o*) was a similar case, the transferor in effect

(*k*) *De Pass's case*, 4 De G. & J. 544. 457, V.-C. K.; *Hatton's case*, 8 Jur. N. S. 380.

(*l*) 1 De G. F. & J. 75.

(*n*) 27 Beav. 465.

(*m*) See *Costello's case*, 2 De G. F. & J. 302; *Garstin's case*, 10 W. R.

(*o*) 1 De G. F. & J. 75.

giving the transferee the money expressed to be paid for the shares. The Court treated the whole transaction as a mere fable which the parties were acting, and held upon the evidence that they never intended the transfer to have any effect as between themselves. In this case also the shares passed by delivery.

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In *Chinnock's case* (*p*), there was a formal transfer, and the company's deed contained a clause that trusts should not be recognised; but the transferor was nevertheless put on the list as it was clear that the transferee had no real interest in the shares, and the trust was merely created to screen the transferor from liability.

Chinnock's case.

In *Costello's case* (*q*), a son transferred his shares to his father, who was old, and was supported by his family. The sale was expressed to be made for a trifling consideration, after the company had been ordered to be wound up, and was clearly not a *bonâ fide* transaction, but a mere device to substitute the father for the son. The son was put on the list.

Costello's case.

Alexander's case (*r*). There a shareholder, who was a broker, transferred his shares to a clerk for an alleged consideration of 97*l.* 10*s.*, which was never paid. The clerk was settled on the list, and was ultimately attached and imprisoned for not paying the calls made upon him. He then took the benefit of the Insolvent act. The transferor was afterwards examined, and the result was that the transfer was held invalid, and he was put on the list in the place of the clerk.

Alexander's case.

Budd's case (*s*). There a solicitor transferred shares to his servant without consideration, and solely for the purpose of escaping from liability. The solicitor was held to be a contributory. It was considered that the servant might have repudiated the transaction, and that the company was entitled to show that the transfer was invalid, although the transferee did not himself impeach it.

Budd's case.

Hatton's case (*t*). There the transfer was made after notice of a call, and in order to avoid payment of it. The directors

Hatton's case.

(*p*) Johns. 714. See, also, *Scully's case*, 6 Ir. Ch. 72.

(*q*) 2 De G. F. & J. 302.

(*r*) 9 W. R. 410, V.-C. W.

(*s*) 30 Beav. 143, affirmed on appeal, 3 De G. F. & J. 297.

(*t*) 8 Jur. N. S. 380. Compare *Orpen's case*, 9 ib. 615, ante, p. 1349.

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De Pass's case.

had refused to register the transfer. The transaction was plainly a mere device to avoid liability.

De Pass's case (u), is the only case of this class in which the transferor was held not a contributory. There a shareholder knowing that the company was in difficulties transferred his shares to a clerk for a nominal consideration. The shares were transferable by delivery, and the Court of Appeal came to the conclusion that the transfer was a real transfer out and out. This case is extremely difficult to reconcile with the others noticed above, and is generally admitted to be unsatisfactory (x).

Whether *De Pass's case* was rightly decided or not, both that and the other decisions above referred to establish, that notwithstanding a complete transfer, the transferor will be held a contributory if the evidence shows not only that the transfer was made to get rid of liability, but that the transfer was not a real transaction, and was not intended to divest the interest of the transferor, and to render the transferee the *bonâ fide* owner of the shares, but that the transferee held them subject to the orders of the transferor: and although it cannot, perhaps, be denied that, in the cases in question, the relation of trustee and *cestui que trust* was created, it is obvious that the sole object of the trust was to screen the transferor from liability. The cases show that such devices will not have the effect desired by the persons who practise them.

Transfers to
infants.

Upon the same principle, fathers who transfer shares into the names of their infant children in order to avoid responsibility, are liable to be made contributories (y). Even if the transfer has been made *bonâ fide*, and the infant has been accepted as a shareholder in respect of the shares transferred, and there has been no deception practised on the company, still, if the company is insolvent, the Court will declare it not to be for the benefit of the infant that he should accept the

(u) 4 De G. & J. 544.

(x) The Master of the Rolls put *De Pass* on the list. The Lords Justices reversed the decision. An appeal to the House of Lords was prevented by a compromise.

(y) *Reaveley's case*, 1 De G. & S. 550, where the transferee was untruly stated to be of age; *Litchfield's case*, 3 ib. 141, where he was described as *Master*.

shares, and the consequence will be to annul the transfer and render the transferor a contributory (z). Bk. IV. Chap. 3.
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So, if a shareholder transfers shares into the name of a person without his authority, and the transferee never accepts the shares, the transferor will be the contributory (a). Transfers to
persons not con-
sulted.

A *bonâ fide* transfer to a director as an individual, and not as a trustee for the company, has the same effect as any other transfer (b). So has a *bonâ fide* transfer to a director or other person who is a nominee for the company; provided the transferor acted throughout in the belief that he was dealing with an ordinary individual, and had no notice of any trust for the company (c). But, as will be seen in the next section, a surrender of shares to the company does not release a shareholder from liability to be made a contributory, unless the surrender is warranted by the constitution of the company. Transfers to
directors.

Before leaving this branch of the subject, it is necessary to allude to those difficult and exceptional cases which occasionally arise on winding up old companies, the deeds of settlement of which contain clauses to the effect that a transfer of shares shall not release the transferor from liability in respect of antecedent losses. In *Holmes's case* (d), where there was such a clause, and where it was proved that there were debts incurred before the shares in question had been transferred, and which debts were still unpaid, it was nevertheless held that the transferor was not a contributory; for both before and after he sold his shares, accounts not showing any losses had been laid before the shareholders, and by those accounts the company was held bound. Cases where the
transferor re-
mains liable to
losses notwith-
standing the
transfer.

In *Helby's case*, *Stokes' case*, and *Horsey's case* (e), however, Holmes's case.

(z) See *Reid's case*, 24 Beav. 318; and compare *Maxwell's case*, ib. 321, where the father was not allowed to execute the company's deed, and was therefore held not a contributory.

(a) *Hennessey's Executors' case*, 3 De G. & Sm. 191, and 2 Mac. & G. 201; *Pim's case*, 3 De G. & Sm. 11, and 1 Mac. & G. 291, noticed *ante*, p. 1313.

(b) *Jessop's case*, 2 De G. & J. 638, and the cases cited in the next note.

(c) See *Grady's case*, 1 De G. J. & S. 488, and others of that class, noticed *infra*, p. 1369.

(d) 2 De G. Mac. & G. 113, and 4 De G. & S. 312.

(e) L. R. 2 Eq. 167. See, also, *Sanderson's case*, 3 De G. & Sm. 66, which was afterwards observed upon in *Dodgson's case*, ib. 85, and was appealed to the Lords, 3 Ho. Lo. Ca. 698, when the order of the Court below was varied by consent.

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Helby's, Stokes',
and Horsey's
cases.

which arose under the Companies act, 1862, on winding up an old banking company, the deed of settlement of which contained a similar clause, the V.-C. Kindersley held (1), that a person who had transferred his shares more than twenty years before the commencement of the winding up ought not to be put on the list at all; but (2) that persons who had transferred their shares within that time were liable to be put on the list, but that their liability was to be confined to their proportions of the losses, if any, which had accrued whilst they held their shares. There was evidence to show the existence of such losses.

b) *Where the transferee has not been accepted by the company in the place of the transferor.*

In all cases of this class, something remains to be done before the transferor ceases to be a shareholder, and he therefore *prima facie* remains a contributory. There is generally a clause to this effect in a company's articles or deed of settlement, but even where there is no such clause, the moment it is established that where shares are held in trust, the trustee and not the *cestui que trust* is the contributory (f), it follows that a seller of shares, who, as between himself and the company, remains the holder of them when the winding up commences, must be the contributory in respect of them. Nor would there be much difficulty in cases of this kind were it not for those provisions in the Companies act, 1862, which relate to the rectification of the register, and to the power of the Court and the liquidators to permit alterations to be made in the status of members after the winding up has commenced. Before, however, examining this subject, it will be convenient to refer to some of the older authorities illustrating the general rule, that a seller of shares is a contributory, unless the purchaser has been accepted as a shareholder in his stead.

Humby's case.

In *Humby's case* (g) some shares in a cost-book mine were sold. The shares of the company were transferable by delivery, but until the transferee had caused himself to be registered in

(f) *Ante*, p. 1311.

(g) 5 Jur. N. S. 215, V.-C. K.
Compare this and the following

cases with *Mayhew's case*, and others of that class, noticed *ante*, p. 1306.

the cost-book, he was not entitled to dividends, nor did the transferor cease to be a shareholder. The purchaser in the case in question paid for the shares and took the certificates for them, but he did nothing more, and it was held that the seller was a contributory.

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So in *Chartre's case* (h), where shares had been sold and assigned, but the purchaser had not been accepted by the directors as a shareholder (such acceptance being necessary), the seller was held a contributory, although the directors themselves were the parties to whose default the non-acceptance of the purchaser was attributable.

Chartre's case.

So in *De Castro's case* (i), where, in consequence of fraud, the seller was precluded from compelling the purchaser to accept the shares he had agreed to take, and the purchaser had not complied with those requisites which, as between him and the company, were necessary to make him a shareholder.

De Castro's case.

So in *Ex parte Walton* and *Ex parte Hue* (k), where, before the shares sold were duly transferred, the company stopped payment and the transfers were never completed.

Ex parte Walton
and Hue.

The same principle is illustrated by other cases to which it is needless particularly to refer (l).

For similar reasons the executors of a deceased shareholder remain liable to be made contributories after they have sold the shares of their testator, until the purchaser has been accepted by the company as a shareholder in respect of them (m).

Transfers by
executors.

The principle of these cases is particularly applicable to transfers by or to directors; for it is more especially the duty of directors to observe all requisite formalities. If therefore they transfer their own shares informally, it is their own fault (n); and if shares are transferred to them informally, although it may not be the fault of the transferor, it will strongly corroborate other evidence tending to show that the

Transfers to or
by directors.

(h) 1 De G. & S. 581.

(i) 2 Jur. N. S. 1203.

(k) 3 Jur. N. S. 853.

(l) See the Irish cases of *Ex parte Scully*, 6 Ir. Ch. Rep. 72, and *Ex*

parte Kennedy, ib. 121.

(m) *Keene's Executors' case*, 3 De G. Mac. & G. 272.

(n) *Brown's case*, 19 Beav. 97.

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transfer was not made *bonâ fide* (o). Such evidence may, of course, be rebutted, and then the informality will be of less consequence (p).

The general rule, illustrated by the foregoing decisions, is as applicable at the present day as formerly (q), subject to the qualification introduced by the Companies act, 1862, and which it is proposed now to examine.

Companies act,
1862, § 153.

By § 153 of the Companies act, 1862, it is enacted, that where a company is being wound up by the Court, or subject to its supervision, every transfer of shares or alteration of the status of the members of the company made between the commencement of the winding up and the order for winding up shall be void, unless the Court otherwise orders; and by § 131, it is enacted, that where a company is being wound up voluntarily, all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company, taking place after the commencement of the winding up, shall be void. Transfers made after a winding-up order are *à fortiori* void if not sanctioned by the Court or the liquidators (r). The effect of these enactments appears to be that after the commencement of the winding up of a company its register of members cannot be lawfully altered; except by the order of the Court, or, in a case of voluntary winding up, by the sanction of the liquidators. The act, it will be observed, applies not only to cases where shares have been transferred after the commencement of the winding up, but also to cases where they have been transferred previously, but the transfers have not been registered. The words "alteration of the status of the members" plainly include the last-mentioned cases. But it is by no means clear from the language of the act, nor is it yet settled by decision, whether the Court can, under § 153, alter the register in cases to which § 35 does not apply; or whether § 35 restricts the general power to sanction transfers which is conferred on the Court by § 153 (s).

Altering register
of members.

(o) *Henderson's case*, 19 Beav. 107.

(p) *Bagge's case*, 13 Beav. 162.

(q) See the summary of cases below, under the head "Transferor

held a contributory."

(r) See §§ 38 and 74, and compare 11 & 12 Vict. c. 45, § 76.

(s) See as to the construction of

Again, whether the Court can exercise the discretion, which is generally reposed in the directors, of permitting or refusing transfers is another very important matter, on which there is also a conflict of judicial opinion. This question, it will be observed, does not depend on the power of the Court to rectify the register, but on its power to substitute its own judgment for that of the persons in whom the discretion of accepting or rejecting transferees has been reposed by the members of the company; and whilst the V.-C. Kindersley held that the Court could not substitute its own judgment for that of the directors (*t*), the V.-C. Malins has since held the contrary (*u*). Until the differences of opinion on these important points are removed by authority, it will be impossible to lay down any trustworthy general principles applicable to the subject under consideration.

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The following observations, however, it is hoped, will be found to be in accordance with the most recent decisions:—

a) *Where the sale has taken place before the commencement of the winding up.*

1. If a person has sold his shares, and has unnecessarily delayed compelling the purchaser to complete the transfer, and the seller remains the registered holder at the commencement of the winding up, he, and not the purchaser, will be placed on the list (*x*); although, as between the seller and the purchaser, the former may be entitled to an indemnity from the latter (*y*), and although each of them may be as solvent as the other (*z*).

Delay on the part of the parties to the transfer.

§ 35, *ante*, p. 1299, and the judgments of the L. JJ., in *Ward and Henry's case*, L. R. 2 Ch. App. 431.

(*t*) *Walker's case*, L. R. 2 Eq. 554. See, also, *Shepherd's case*, L. R. 2 Ch. App. 16; *Marzetti's case*, 1 W. N. 399; *Nation's case*, L. R. 3 Eq. 77.

(*u*) *Ward's case*, 2 W. N. 100. Both cases arose in winding up the same company.

(*x*) *Ward and Henry's case*, L. R. 2 Ch. App. 431, reversing *Ward's case*, L. R. 2 Eq. 226; *Head's case*,

L. R. 3 Eq. 84; *White's case*, *ib.* The observations of the Master of the Rolls in *Ward's case*, L. R. 2 Eq. 226, were commented upon and explained by him in these two last cases. Compare *Colonial and General Gas Co.*, 2 W. N. 118, where there was considerable delay.

(*y*) *Head's case*, and *White's case*, L. R. 3 Eq. 84.

(*z*) *Ibid.* In *Head's case* the liquidator was indifferent as to which of the two was put on the list.

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No delay, and
transfer com-
plete although
not registered.

Discretion of
directors exer-
cised by the
Court.

2. Where before the commencement of the winding up shares are *bonâ fide* sold, and the transfer has been executed by both transferor and transferee, and has been left for registration at the company's office, and there has been no unnecessary delay on either side in completing the transfer, and nothing remains to be done except to register it, and the company, having had an opportunity of registering, have neglected, but not declined, to do so (a): under these circumstances the Court will allow, and indeed order, the transferee's name to be substituted for that of the transferor, unless there is some good reason why the transfer should not be completed (b). Even if the transferee has not executed the transfer, still if he has accepted the shares, and has been accepted by the directors as a shareholder, the transferee will be treated as the owner (c).

3. Where, as is generally the case, the directors have power to decline to register a transfer if the transferee is not approved by them, and a transfer has been left for registration in sufficient time to be approved before the commencement of the winding up, but has not been approved; still, if no delay is imputable to the parties to the transfer, and there is no reason for supposing that the directors would have declined to accept the transferee, the Court will accept him, and order his name to be registered, at least if the liquidator does not object (d). But if the directors did object on proper grounds, the Court clearly could not interfere; and it has been held competent for directors, seeing that the company is *in extremis*, to resolve that no more transfers shall be registered without their express sanction; and in a case where this was done, the Court declined to complete a transfer left for registration just before the passing

(a) See *infra*, 3 and 4, as to this.

(b) *Ward's case*, 2 W. N. 100, V.-C. M.; *Nation's case*, 3 Eq. 77; *Read's case*, 2 W. N. 114; *Colonial General Gas Co.*, 2 W. N. 118; and see *Ward's case*, L. R. 2 Eq. 226.

(c) *General Floating Dock Co.*, 2 W. N. 27, where the transferee was registered.

(d) *Ward's case*, 2 W. N. 100;

Nation's case, 3 Eq. 77. See, also, *Colonial General Gas Co.*, 2 W. N. 200, where there had been delay, and the liquidators did object. But see contra, the observations of V.-C. Kindersley, in *Walker's case*, L. R. 2 Eq. 554; and *Marzetti's case*, 1 W. N. 399, where, however, the transfers were not left before the winding up commenced.

of the resolution (e), although the Court did complete a transfer which was left for registration, and ought to have been registered before the resolution was passed (f).

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4. It is always material, in these cases, to ascertain whether the directors have received a proper transfer in sufficient time before the commencement of the winding up to enable them to pass or reject the transfer in the ordinary course of business. Where there has been no board meeting in the interval between the leaving of the transfer and the commencement of the winding up, the Court has never yet completed the transfer, and it is very doubtful whether the Court has any power to do so (g). But where there has been such a meeting, although only one, delay is imputable to the company in not passing and registering the transfer, and the Court can and will order it to be completed if the parties to the transfer have not themselves been guilty of delay (h).

Delay in registering transfer.

5. But this assumes that the transfer left for registration is in the proper form: if it be not, no delay is imputable to the company, and the transferor will be the contributory. *Marino's case* (i) is a strong illustration of this. There a foreigner had by letter directed the company, as his agents, to buy shares in the company itself for him. The company did so, and paid for the shares, and debited him with the price. The articles of association prescribed no particular form of transfer; but the transfers always had been in the usual form, viz., by deed executed by both transferor and transferee. The seller left a transfer executed by him, but not by the transferee, at the office of the company on the 7th of May; a board meeting was held on the 10th, and also on the 11th, when it was resolved to suspend business. The transfer was never registered. The transferor was held a contributory, although it was insisted by

Informal transfers.

Marino's case.

(e) *Shepherd's case*, L. R. 2 Ch. App. 16, and 2 Eq. 564. Compare *Nation's case*, L. R. 3 Eq. 77.

(f) *Nation's case*, L. R. 3 Eq. 77.

(g) See *Ward and Henry's case*, L. R. 2 Ch. App. 431; *Shepherd's case*, ib. 16; *Marzetti's case*, 1 W. N. 399; *Read's case*, 2 W. N. 114.

(h) See *Nation's case*, L. R. 3 Eq. 77; *Marino's case*, 2 W. N. 88; *Read's case*, 2 W. N. 114; *Hill's case*, ib. 137.

(i) Before the L. JJ., April, 1867, reversing S. C., 2 W. N. 88. The purchaser suspended payment soon after the company stopped.

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him that, under the peculiar circumstances of the case, the company could not have refused to register the transfer. The directors, however, had no authority to execute the transfer for the purchaser, and it was held that they were not bound to register him until he had executed it by himself, or a duly constituted attorney.

β) Where the sale has taken place since the commencement of the winding up.

If, in order to rectify a company's register and to substitute the name of a transferee for that of the transferor, it is essential that the transfer shall be left for registration before the functions of the directors cease, it will follow that a person who sells his shares after that time must, under all circumstances, be a contributory. But if this is not essential, there will be the same power of making the substitution where sales are made after, as where they are made before, a petition to wind up (*k*). It is obvious, however, that to allow shareholders to get rid of their liabilities by selling their shares after the commencement of the winding up of the company would lead to the greatest fraud; and it is difficult to conceive any circumstances which can entitle such a seller to have the purchaser substituted for him, if the liquidators or the creditors oppose the substitution. Nor is there yet any reported case in which the substitution has been made, even where there has been no opposition on their part.

In *Emmerson's case* (*l*), indeed, the Master of the Rolls made the substitution; but the decision was reversed on appeal (*m*). This case, moreover, was decided before it was held, as it now is, that the question who ought to be on the list of contributories, is materially different from the question whether the seller is entitled to indemnity from the purchaser. In *Walker's*

(*k*) See acc. *Emmerson's case*, L. R. 1 Ch. App. 433.

(*l*) L. R. 2 Eq. 231.

(*m*) L. R. 1 Ch. App. 433. It was reversed upon the ground that neither buyer nor seller knew of

the petition to wind up, and that under those circumstances a decree for specific performance could not have been made against the purchaser. See, also, *Watkin's case*, 1 W. N. 219.

case (n), the Court declined to make the substitution, on the ground that the Court could not itself exercise the discretion of approving or rejecting transferees, and which discretion was vested by the articles of the company in the directors (*o*). In each of the above cases the liquidator was indifferent as to which person was on the list.

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In order to facilitate a comparison between the cases upon the subject in question, the following short analysis of them is appended:—

CASES RELATING TO UNREGISTERED TRANSFEREES.

1. *Transferor held a contributory.*

Delay in compelling the purchaser to complete, and no default on the part of the company.

Ward and Henry's case, L. R. 2 Ch. App. 431 (*p*), reversing S. C., L. R. 2 Eq. 226. Sale two years before the winding up; delay occasioned by disputes between the purchaser and sub-purchaser from him. A transfer had been executed by the vendor, and sub-purchaser, and had been left for registration long before the winding up; but owing to the disputes in question, the directors had declined to register it.

*Ward and
Henry's case.*

Head's case, L. R. 3 Eq. 84. }

White's case, ib. 86. }

Sale two years before the winding up: transfer executed by transferor; transfer never left for registration. The directors had power to refuse to register transfers under certain circumstances, but they were not applicable to these particular cases, and the liquidator was indifferent which person was put on. *Head's case.*
White's case.

No (great) delay attributable to the parties, but no unnecessary delay or default on the part of the company.

Shepherd's case, L. R. 2 Ch. App. 16, affirming S. C. 2 Eq. 564. *Bonâ fide* sale on 16 Dec. 1865: transfer executed by both parties, and left for registration on the 2nd or 3rd of March. Directors had power to decline to register any transfer, if they considered that it was made for purposes not conducive to the interests of the company; they passed a resolution on the 3rd of March, not to register any transfers without the express sanction of the board. On the 5th of March they resolved to stop, and to present a petition to wind up: petition presented on 7th of March.

Shepherd's case.

This case was decided on appeal, on the ground that in the ordinary

(*n*) L. R. 2 Eq. 554.

(*o*) But this was not followed by V.-C. Malins, in *Ward's case*, 2 W. N. 200, where, however, the sale took place, and the transfer had

been left for registration before the commencement of the winding up.

(*p*) The judgments in this case are particularly valuable.

- Bk. IV. Chap. 3.
Div. 1. Sect. 10.* course of business the transfer would not have been passed before the next board meeting after the transfer was left; and that such meeting would not have been held until the 8th of March, and that no default or unnecessary delay could be imputed to the directors. Compare *Nation's case*, and *Read's case*, *infra*.
- Marino's case. *Marino's case*, ante, p. 1359. No duly executed transfer left with the company.
- Marzetti's case. *Marzetti's case*, 1 W. N. 399, V.-C. W. Sale a few days before winding up; no transfer executed and left for registration before winding up; directors had power to decline to register a transfer if the transferee was not approved by the board; the liquidator was indifferent which person was put on the list.
- Read's case.
Parrish's shares. *Read's case*, 2 W. N. 114, M. R. (Parrish's shares). Sale on 16th Jan. 1866; call made on the 29th Jan., and notice sent to seller; transfer executed and left on 24th Feb.; board meetings held on 27th Feb., and again on 1st March; other facts as in *Shepherd's case*. Compare *Read's case* (Smallbone's shares) *infra*.
- Walker's case. *Walker's case*, L. R. 2 Eq. 554. Sale at a discount after company had stopped payment; transfers required to be executed by both parties; directors had power to reject transfers to persons not approved by them; seller executed transfer and handed it and the certificates to the purchaser; purchaser refused to execute. The liquidator was indifferent as to which was put on. This does not appear in the report, but was stated to the Court by counsel engaged in the case, when *Ward's case*, 2 W. N. 200, was being heard.
- Emmerson's case. *Emmerson's case*, L. R. 1 Ch. App. 433, reversing S. C., L. R. 2 Eq. 231. Bonâ fide sale after, but in ignorance of petition to wind up, and before it was advertised. The transfers were executed, the purchase money was paid, but the transferee had not been registered. The liquidator was indifferent which was put on.

2. Transferor held not a contributory.

- Nation's case. *Nation's case*, L. R. 3 Eq. 77. Bonâ fide sale, on 31 Jan. 1866; transfers executed by both parties left for registration, and entered in the transfer book, and passed on 26th Feb. 1866, by the director, whose duty it was to inspect transfers. Under ordinary circumstances the transfer would have been brought before the next board meeting, on 1st of March, for confirmation, and the transferee would then have been registered as a member. No transfers, however, were laid before the board at that meeting, most of the directors having been newly appointed; other circumstances as in *Shepherd's case*, ante.
- Read's case.
Smallbone's shares. *Read's case*, 2 W. N. 114, M. R. (Smallbone's shares). Bonâ fide sale and transfer of shares; transfer left for registration on 31st Jan. 1866; call made on the 29th, and notice sent to purchaser. Transfers not passed by one director on 27th Feb., or brought before board meeting on 1st March, although they might have been; other circumstances as in *Nation's case* and *Shepherd's case*, *supra*. Compare *Read's case* (Parrish's shares) *supra*.
- Ward's case. *Ward's case*, 2 W. N. 100. Bonâ fide sale and transfer; transfer

executed by both parties, and left for registration the day before the company stopped; transfer never brought before directors; company wound up voluntarily, subject to supervision; liquidators completed all transfers left with the company before the stoppage, and put the transferee on the list of contributories. The Court declined to take him off, although the liquidators were indifferent as to whether he or the transferor was on. The directors had power to reject transfers to persons not approved by them, but notwithstanding *Walker's case* the Court itself exercised this power. This is the only case where this has been done, where the directors had not had an opportunity of exercising their own judgment.

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Hill's case, 2 W. N. 137. Bonâ fide sale and transfer of shares; transfer duly executed left for registration. The practice of the company was that one director should attend once a week, and inspect the transfers, and pass them if he approved them; the board at their next meeting confirmed the transfers thus passed. The director whose duty it was to attend and examine the transfers neglected to do so, and the transfer in question was therefore never passed as it would otherwise have been. The transferee was put on the list.

Hill's case.

Colonial and General Gas Co., 2 W. N. 118, V.-C. S. (*Riddell's case*). Bonâ fide sale and transfer executed by both parties, and left for registration a year before the winding up. The directors had power to decline to register transfers, unless the transferees were approved by the board; nothing more was done. The purchaser became bankrupt after the winding up. There was evidence to show that the seller believed that the transfer had been completed. The Court held it to be a clear case of default and unreasonable delay on the part of the company, and that the seller's neglect to have his name removed from the register only affected the question of costs. But compare *Head's case* and *White's case*, where, however, the transfers had not been sent in to the company.

Colonial and
General Gas
Company.
Riddell's case.

General Floating Dock Co., 2 W. N. 27, M. R. (*Duthy and Hughes's case*). This case hardly belongs to the class under consideration. The purchaser had not executed any transfer, but he had been accepted and registered before the winding up began. There was evidence to show that the transferee was a nominee of the directors, and that the company paid for the shares, but there was nothing to fix the seller with notice of this.

General Floating
Dock Company.

2. *As regards persons who have surrendered their shares to the company.*

The right of shareholders to retire from a company has been discussed in an earlier chapter (*q*), and it was there seen that, speaking generally (but excepting cost-book mining companies), the only mode in which a shareholder can retire from a com-

Surrenderors of
shares.

(*q*) *Ante*, p. 722, *et seq.*

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Morgan's case,
Stanhope's case,
Munt's case.

pany is by transferring his shares to some other person. If, therefore, a shareholder has surrendered his shares, and even if they have been cancelled by the directors, he will, nevertheless, be a contributory, unless he can show that the company is bound by what has taken place. *Primâ facie*, directors have no right to accept a surrender of shares.

Morgan's case (r), *Stanhope's case* (s), and *Munt's case* (t), and the cases which arose on winding up the *Agriculturist Cattle Insurance Company* (u), the facts of which have been before stated (x), are leading authorities upon the subject now in question; and it appears from them, and other cases which will be found in the notes below, that, unless the constitution of a company is such as to warrant directors in accepting a surrender of shares, or unless an unauthorised surrender has been so ratified by the company as to become binding upon it (y), a person whose shares have been surrendered will, nevertheless, remain liable to be a contributory. This has been held where the directors would have had power to buy shares of the company out of certain accumulated funds if they had existed, which, however, they did not, and the shares were nevertheless purchased by the directors for the company in pursuance of a resolution passed at one general meeting of the shareholders (z), and ratified at another similar meeting (a). So, where the shares had been surrendered and cancelled considerably more than six years before the company was ordered to be wound up (b); where the cancelled shares had been allotted without authority (c);

(r) 1 De G. & S. 750, and 1 Mac. & G. 225.

(s) 3 De G. & S. 198.

(t) 22 Beav. 55.

(u) *Stanhope's case*, L. R. 1 Ch. App. 161; *Stewart's case*, ib. 511; *Spackman's case*, 11 Jur. N. S. 207, reversing S. C., 10 Jur. N. S. 911. In these cases the terms of the compromise were not accepted, and the retirement took place afterwards, and without publicity. This distinguishes them from *Brotherhood's case*, 31 Beav. 365.

(x) *Ante*, pp. 725-26.

(y) As to which, see *Brotherhood's*

case, 31 Beav. 365, noticed *ante*, p. 726, and *Hunt's case*, 32 ib. 387.

(z) *Ex parte Morgan*, 1 Mac. & G. 225, and 1 De G. & S. 750, *ante*, p. 725.

(a) *Lawes's case*, 1 De G. Mac. & G. 421. See, also, the cases in note (u).

(b) See *Stanhope's case*, *Stewart's case*, and *Spackman's case*, *ante*, note (u), and p. 726. See, also, *Stanhope's case*, 3 De G. & S. 198, noticed *ante*, p. 725, and *Richmond's Executors' case*, ib. 96.

(c) *Holt's case*, 1 Sim. N. S. 389.

where they had been transferred to the surrenderor in an informal manner (*d*); where they were those of dissatisfied shareholders, whose retirement was one of the terms of a compromise effected with them (*e*); where the shares were those of dissatisfied directors wishing to have nothing more to do with the company (*f*); where the shares were those of a person who had released all his claims upon the other shareholders, for such a release is not a release by them of their claims on him (*g*); where the shares were cancelled on non-payment of a call made for the purpose of enabling the shareholder to get rid of his shares (*h*); where the shares were held by a trustee, and were cancelled pursuant to a compromise between the *cestui que trust* and the company (*i*); where the shares were cancelled and exchanged for other shares, pursuant to a scheme for amalgamating the company with another (*k*). These cases show conclusively that it is not within the power of a majority of shareholders to bind the company by assenting to an improper surrender of shares: and, as before observed, it is doubtful how far acquiescence and lapse of time can avail against the company (*l*).

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Where, however, the shareholders have power to relinquish their shares, and do relinquish them in the exercise of that power, then, as between themselves and the company, their liability is at an end, and on the winding up of the company they are not liable to be made contributories. The following cases, relating to cost-book mines, may be referred to as examples of this.

Persons who have
duly surrendered
their shares not
contributories.

Fenn's case (*m*). In this case a mining company had been formed on the cost-book principle. By one of the regulations

Cases of share-
holders in cost-
book companies.

(*d*) *Walter's 2nd case*, 2 De G. & S. 244.

cases noticed *ante*, p. 726.

(*e*) *Bennett's case*, 5 De G. Mac. & G. 284, and 18 Beav. 339. See, also, the cases in note (*b*), noticed *ante*, p. 726.

(*g*) *Ex parte Apps*, 18 L. J. Ch. 409.

(*f*) *Munt's case*, 22 Beav. 55; *Daniell's case*, *ib.* 43, and on appeal, 3 Jur. N. S. 803; *Stanhope's case*, 3 De G. & S. 198. See *Walker's case*, 8 De G. Mac. & G. 607, *Brown's case*, 19 Beav. 97, and the

(*h*) *Richmond's case*, 4 K. & J. 305.

(*i*) *Barrett's case*, 10 Jur. N. S. 711, L. J.

(*k*) *Austen's case*, 2 W. N. 138.

(*l*) See *ante*, pp. 726 and 903.

(*m*) 4 De G. Mac. & G. 285, and 1 Sm. & G. 26.

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of the company it was declared, that a shareholder might determine his liability by giving notice in writing of his desire to retire from the company, and upon depositing the transfer of the shares held by him, and signing a relinquishment of all claims upon the company in respect of such shares. Fenn was a holder of 98 shares in the company, and he had paid all the calls made upon him as a shareholder. The company being in difficulties, Fenn signed a printed form, obtained from the purser, and thereby declared that he desired to retire from the company, and that he relinquished all claims against it. The purser, however, declined to accept this surrender, and sent another form, which he said must be signed, and by which, if it had been signed, Fenn would have agreed to bear his share of the company's liabilities up to a future day. This form Fenn declined to sign. On the winding up of the company it was held, that Fenn was not a contributory.

Several other cases to the same effect are reported; viz., *Birch's case* (n) and *Lofthouse's case* (o), in each of which, after the shareholder had retired, the company was registered under 19 & 20 Vict. c. 47, and his name was put on the register of shareholders; and *The Bodmin United Mines* (p), where the shareholder had retired with the consent of the directors and a general meeting of shareholders, without paying a call in arrear. The right to retire in each case was founded on the rules of the company.

Cases of shareholders in other companies.

Precisely the same principle applies to other companies, if the shareholders in them have a right to retire (q); and where the right exists, irregularity in its exercise is of little moment if the retirement has been so acted upon, or ratified by the company as to be binding on it. The following are the leading cases on this head:—

Lane's case.

Lane's case (r). There the company's deed of settlement

(n) 2 De G. & J. 10.

(o) Ib. 69.

(p) 23 Beav. 370.

(q) See, in addition to the cases next cited, *Hawthorn's case*, 10 W. R. 572, V.-C. W., where a person was held not a contributory, he having had power to withdraw, and

having withdrawn accordingly. In this case it was held that notice of withdrawal given to an agent of the company was sufficient.

(r) 1 De G. J. & S. 504. See, also, *Grady's case*, ib. 488, and *infra*, p. 1369.

provided that the directors should be at liberty to purchase shares in the company, but not without the previous sanction of a general meeting of the shareholders. Lane had been a director of the company, but he had retired from that office, and after his retirement he offered to sell his shares to the company. The offer was accepted, and it was agreed that they should be taken as part payment of an annuity which the company should grant. The share certificates were accordingly given up, the annuity was granted, and the surrender of the shares to the company was returned to the registrar of joint-stock companies. The surrendered shares were afterwards reissued by the company to other persons, and this issue and the payment of the deposit money payable on allotment appeared in the books of the company. A call on the new shareholders was afterwards made, and paid by them. The annuity, moreover, was paid by the company. There was, however, no evidence to show that the purchase of the shares had ever been brought to the attention of the shareholders of the company, except that in a balance-sheet laid before them after the surrender there was an entry of the price of the annuity, and also an entry under the head "deposit returned on shares" of the sum at which they had been taken. The V.-C. Kindersley thought that there was no sufficient evidence that the surrender had been approved by the shareholders, and he accordingly put Mr. Lane upon the list of contributories; but on appeal Lord Westbury reversed this decision, holding that it was a just and necessary inference, from the proved facts, that the surrender had been, if not duly authorised, at all events sufficiently ratified by the shareholders.

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In *Busk's case* (s), an active promoter of a company agreed to take fifty shares in it, and he paid the deposits upon them. Before, however, any deed was executed, and before any shares were, in fact, allotted to him, but after the company had begun to carry on its business, and he had acted as a director, he expressed his wish to retire, and he was discharged from being a director by a resolution of his co-directors. An advertisement of his retirement was published in the *Gazette*.

Busk's case.

(s) 3 De G. & S. 267, affirmed on appeal. See 16 Jur. 343.

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The company's deed was afterwards executed by the continuing directors and shareholders, and the acts of the directors prior to its execution were thereby ratified. The retired director had his deposit money afterwards returned, and his shares were cancelled. He was held not to be a contributory.

Cockburn's case.

Cockburn's case (t). In this case the directors had very general powers of entering into and discharging contracts, and were expressly authorised to purchase the company's shares, and to hold them as part of its property. A promoter and director of the company, who had agreed to take 100 shares, and had given his promissory note for the amount payable in respect of them, was desirous of retiring from the company and of surrendering his shares. He was allowed to do so; and, after he had ceased to be a director, his letter accepting the shares, and also his unpaid promissory note, were returned to him. He was held not a contributory, although some of the formalities prescribed by the deed for the relinquishment of shares had not been strictly complied with.

Bagge's case.

Bagge's case (x). In this case also, the directors had power to buy up shares of the company for the benefit of the company, and it was held, that a shareholder who had sold his shares to the directors, was not a contributory, although the sale was not effected in the manner prescribed by the company's deed of settlement.

Distinction between surrendering shares and transferring them to directors.

Before quitting this subject it is necessary to advert to the distinction between a transfer of shares to one or more directors for their own benefit, and a surrender of shares to the company; for, if what is called a surrender of shares is in fact only a *bonâ fide* transfer of them, the transferor will, as between himself and the company, be released from liability, and will not be a contributory, although the main object of the transfer may have been to enable him to get quit of the company (y). Moreover, even if the transfer is made to a person in trust for the company, but the transferor is ignorant of this fact, and throughout acts in the *bonâ fide* belief that he is

(t) 4 De G. & S. 177.

(x) 13 Beav. 162.

(y) *Jessop's case*, 2 De G. & J. 638. See, also, the next three notes.

transferring his shares to the transferee as an individual, the transfer will be valid, and the transferor will not be a contributory. Upon this head *Reeve's case* and *Grady's case* are leading authorities (z). Bk. IV. Chap. 3.
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In *Reeve's case* (a), a discontented shareholder threatened to wind up the company, or to file a bill against the directors unless they found some one to take his shares, and give him an indemnity. The shares were not marketable; one of the directors bought the shares, and paid for them, and they were registered in his name, and the required indemnity was given. The transferor acted with perfect *bona fides* throughout, and took all possible precautions to render the transfer legal, and it was held that the transaction was valid, and that the transferor was not a contributory. Reeve's case.

In *Grady's case* (b), a shareholder brought an action against the company. The action was compromised upon the terms that the company should pay a certain sum of money to the shareholder, and that he should transfer his shares to the managing director. This was done, and the transfer was duly entered in the books of the company, and the transferee was returned in respect of them to the registrar of joint-stock companies. The transfer was proved to have been, in fact, made to the managing director as a trustee for the company, but the transferor denied all knowledge of this, and the Court held that the circumstances of the case were not of themselves sufficient to affect him with notice of the character in which the director took the shares. The transferor was, therefore, held not to be a contributory (c). Grady's case.

On the other hand, in *Clack's case* (d), where a scheme was Invalid transfers.

(z) See, also, *Holwey's case*, 1 De G. & S. 777; *Nicol's case*, 3 De G. & J. 387; *General Floating Dock Co.*, 2 W. N. 27, in which it was also contended that the transferor had notice that the transferee was a trustee for the company.

(a) 10 W. R. 817, V.-C. W.

(b) 1 De G. J. & Sm. 488.

(c) In this case the directors had power to buy up shares in the company, with the sanction of the

shareholders; and Lord Westbury held that even if Dr. Grady had known that the transferee took the shares for the company, the necessary sanction of the shareholders would have been inferred, and the transfer upheld. See, also, as to this, *Lane's case*, 1 De G. J. & Sm. 504; *ante*, p. 1366.

(d) 1 Weekly N. 275. See, also, *Austen's case*, 2 ib. 138.

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Clack's case.

formed by one company to purchase the business of another company, and the scheme was altogether *ultra vires*, and the dissentient shareholders in the purchasing company transferred their shares to its secretary, and received back the money they had paid on their shares, the transferors were all held to be contributories on the winding up of the purchasing company.

Eyre's case.

Again, in *Eyre's case* (e), a dissatisfied shareholder, who had presented a petition to wind up the company, was induced by the directors to withdraw the petition on the terms that his shares should be transferred, and that the company should pay 200% for the costs of the petition, and 60% for the costs of an action for calls brought against him by the company. The shares were accordingly transferred to one of the directors, and the 260% was paid. The company was not long afterwards ordered to be wound up, upon another petition, and it was held that the transfer was invalid, and that the transferor was a contributory. The Court treated the whole transaction as a dishonest attempt to stifle inquiry.

A transfer to an individual director, moreover, will not relieve the transferor from his liability if the transfer is not made with perfect *bona fides*, and so as to constitute the transferee a shareholder in respect of the shares transferred.

Brown's case.

In *Brown's case* (f), a transfer by a director to a director was held invalid as between the transferor and the company, on the ground that the transfer was made irregularly, and the transferee had already as many shares as he was entitled to

Henderson's case.

hold in his own right; and in *Henderson's case* (g), a transfer by an auditor to a director was held invalid as against the company, because, in addition to the grounds relied upon in the last case, the transferor had made no attempt to transfer his shares in the proper manner, and had acted throughout with want of good faith.

Difference between surrendering shares and declining to take them.

A person who has not bound himself to take shares, can, of course, waive any right to take them which he may have acquired; and an arrangement by which he abandons some

(e) 31 Beav. 177.

(f) 19 Beav. 97.

(g) *Ib.* 107.

and retains the rest, does not entitle the company to hold him a contributory in respect of more shares than he ultimately agrees to take (*h*). Such cases as these do not turn on a shareholder's right to retire from a company, but on a person's right to withdraw from an unconcluded agreement.

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Moreover, if there is a *bonâ fide* dispute as to whether a person is or is not a shareholder or bound to take shares, and such dispute is compromised, and he gives up all his rights (if any) against the company, and the company relinquish all claims upon him, he will not be a contributory; although he might have been had there been no compromise, and although shareholders in the company may have had no right to surrender their shares (*i*).

Compromise of
doubtful lia-
bility.

3. *As regards persons whose shares have been forfeited.*

It was seen in a previous chapter, that the right to forfeit shares does not exist except where it is expressly conferred (*k*). Consequently, persons whose shares have been declared forfeited, do not cease to be shareholders, and are not relieved from their liability to be made contributories as shareholders, unless the forfeiture is warranted by the constitution of the company.

Position of per-
sons whose shares
have been for-
feited.

Barton's case (*l*). Barton had agreed to take shares in a projected company. The shares were allotted to him, and he paid the deposit upon them. He never signed the company's deed of settlement. He sold his shares in the market, but he gave no notice to the company of the sale, and he never executed any transfer. The directors gave notice, by advertisement and circulars, that the shares of those shareholders who did not sign the deed before a certain day would be forfeited. After the day had passed, it was resolved at a general meeting of shareholders, that the shares of those who

Barton's case.

(*h*) See *Meyer's case*, 16 Beav. 383; *Coleman's case*, 1 De G. J. & Sm. 495; *Hebb's case*, 2 Weekly N. 137.

(*i*) See *Lord Belhaven's case*, 3 De G. J. & Sm. 41. See, too, *Blake's*

case, 34 Beav. 329, and the cases cited in the last note.

(*k*) *Ante*, p. 729, *et seq.*

(*l*) 4 Drew. 535, affirmed on appeal, 4 De G. & J. 46. See, too, *Ex parte Jones*, 27 L. J. Ch. 666.

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should not sign the deed by another day then named, should be absolutely forfeited. In pursuance of this resolution, many shares, including Barton's, were forfeited. There was no power in the deed to forfeit the shares of the original allottees, although there was power given to forfeit the shares of transferees if they did not execute the deed within three months after the transfer to them. It was held, that the declaration of forfeiture was altogether *ultra vires*, and that Barton was a contributory.

Persons whose
shares have been
duly forfeited
not contribu-
tories.

On the other hand, where there is power to forfeit shares, and shares are *bonâ fide* forfeited in pursuance of the power, the shareholder who is thereby deprived of all interest in the company, is not liable to be made a contributory on its winding up, unless, notwithstanding the forfeiture, he continues, as between himself and the company, liable for its debts, which, although not an impossible, is a very improbable case (*m*).

Irregular for-
feitures.

Although a power to forfeit is one which must be exercised with the greatest attention to the formalities prescribed by the instrument conferring it (*n*), still, if everything required to be done is substantially done by the company, and if the shares are treated both by the company and by the shareholder as forfeited, then the company will be precluded from afterwards treating them as unforfeited, and from holding the shareholder a contributory. This is well exemplified by *Woollaston's case* (*o*), where there was a power to forfeit shares for non-payment of calls. The directors made a call, and Woollaston, who was a shareholder, was required to pay it. A resolution was passed by the directors, that the shares of defaulters should be forfeited. After the passing of this resolution, Woollaston received a formal notice from the directors, that unless his call was paid within twenty-one days, his shares would be imme-

Woollaston's
case.

(*m*) *Woollaston's case*, 4 De G. & J. 437, reversing on this point S. C., 5 Jur. N. S. 617. See, also, *Beresford's case*, 3 De G. & S. 175, and 2 Mac. & G. 197; *Ex parte Bailey*, 15 Jur. 29. These cases show that if a company's deed confers a power of forfeiture,

that power may be exercised against a person who ought to execute, but has not, in fact, executed, that deed.

(*n*) *Ante*, p. 734, *et seq.*, and 828.

(*o*) 4 De G. & J. 437, reversing on this point, *Woollaston's case*, 5 Jur. N. S. 617.

diately forfeited. Nothing more was done on either side, and no declaration of actual forfeiture was made. The company continued its business for two years and a half after the notice was given, and was then ordered to be wound up. Woollaston was held not a contributory, although it was contended by the company that there never was more than a threat to forfeit; that his shares had never been forfeited in point of fact; and that there was no power to declare them forfeited by the notice requiring payment of the call.

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So, in *Knight's case* (p), there was power to forfeit for non-payment of calls, on giving certain notices, and by a resolution to that effect: a shareholder from whom calls were due, received notice in proper form that if his calls were not paid on a certain day his shares would be forfeited. He made default, and the secretary thereupon made an entry in the company's books to the effect that the shares were forfeited, and had been transferred to the company. By the regulations of the company the shareholder ought to have had notice of this; but no notice was sent to him; and no resolution to forfeit appeared in the company's books: indeed, it was tolerably plain that there had been no such resolution. The shareholder in question, however, had never acted or been treated as a shareholder after the forfeiture; and it was held, that a resolution to forfeit ought to be presumed, and the shareholder was accordingly held not to be a contributory.

Knight's case.

In both of the above cases, it will be observed that there was power to forfeit, an intention to forfeit, and notice of that intention; and the intention was actually carried into effect, although not with due regularity. But as has been seen on a former occasion, an intention to forfeit not carried into effect is no forfeiture at all (q); therefore, where a shareholder received notice that if he did not pay his calls in arrear by a certain day his shares would be forfeited without further notice; and he paid his calls on some of his shares but not

Intention to forfeit not carried out.

Bigg's case.

(p) L. R. 2 Ch. App. 321. See, also, *Webster's case*, 32 L. J. Ch. 135; *Grady's case*, 1 De G. J. & S. 488, ante, p. 1369, and *Coleman's case*, ib. 495, as to presuming forfeiture.
(q) Ante, p. 734.

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on others, stating that he should submit to their forfeiture, but the directors after all did not forfeit them, but kept his name on the books as it had been before the notice; he was held, on the subsequent winding up of the company, to be a contributory in respect of all his shares (r).

Improper exercise of power to forfeit.

Even where there is a power to forfeit, that power can only be exercised *bonâ fide* for the benefit of the company. If, therefore, a shareholder procures his shares to be forfeited in order that they may be cancelled and got rid of, or as part of a scheme by which he may be enabled to surrender his shares and retire from the company, he will remain a contributory notwithstanding the forfeiture (s).

Distinction between forfeiting shares and withdrawing shares not agreed to be taken.

A forfeiture of shares taken or agreed to be taken, must be distinguished from the withdrawal of shares allotted to a person, but which he has not bound himself to take, and has expressly or impliedly declined to accept. Whether any power to forfeit shares exists or not, such a person is not a contributory (t).

V. PERSONS INDUCED TO TAKE SHARES BY FRAUD.

General observations.

The circumstances under which fraud is and is not imputable to a company (u), and those under which a person induced to take shares by fraud can rescind his contract (x), have been already considered. From the principles which were then seen to be applicable to such cases, it follows that where a person has been induced to take shares from the company by fraud, and that fraud is imputable to the company, he is entitled to repudiate his shares, as against the company, as soon as he discovers the fraud, whilst he cannot repudiate them against

(r) *Biggs's case*, L. R. 1 Eq. 309.

(u) *Ante*, p. 322.

(s) *Richmond's and Painter's case*, 4 K. & J. 305, *ante*, p. 733. See, also, *Stanhope's case*, L. R. 1 Ch. App. 161; *Stewart's case*, *ib.* 511; noticed *ante*, p. 726.

(x) *Ante*, p. 929. *Kisch v. Central Rail. Co. of Venezuela*, referred to in p. 938, was affirmed by the House of Lords. See L. R. 2 App. Ser. Ho. Lo. 99. Some of the grounds relied on in the court below, and mentioned in page 938, were not, however, considered satisfactory.

(t) *Goldsmid's case*, 16 Beav. 262; *Coleman's case*, 1 De G. J. & S. 495, *ante*, p. 1371; *Belhaven's case*, 3 *ib.* 41.

the company at all if he has not taken his shares from the company, or if the fraud is not in point of law the fraud of the company. The application of these principles to the question whether a person induced to take shares in a company by fraud is or is not liable to be put on the list of contributories leads to these conclusions: viz., that, *as between the company and the defrauded shareholder*, he is not a contributory where he has taken the shares directly from the company, and the fraud which induced him to become a shareholder is imputable to the company, and he has repudiated the shares with due diligence; but that he is a contributory in all other cases. These conclusions, moreover, appear to be warranted by judicial decision. They are, no doubt, opposed to some dicta, and even decisions; but, on the other hand, they are supported by other decisions of greater weight, and which have never yet been overruled: and an attentive consideration of the authorities will, it is conceived, lead to the conclusion that, under the older winding-up acts, where the rights of creditors were immaterial with reference to the question of contribution between the shareholders *inter se*, a person induced to take shares from a company by the fraud of the company was not a contributory.

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Position of shareholder towards the company.

But neither the principles nor the decisions above referred to warrant the conclusion that, as between the creditors of the company on the one hand, and a defrauded shareholder on the other, the shareholder ought not to be on the list of contributories under the present system of winding up. It has been already seen that such fraud could not be relied upon at law as a defence to a proceeding by a creditor, whether by action or by *scire facias* (y); and, for reasons which have been also already given (z), it is submitted that such fraud ought not to enable the shareholder in a company registered under the Companies act, 1862, to escape from being put on the list of contributories, there being no other method by which the creditors can have recourse to him. The justly celebrated decision of the V.-C. Malins, in the great case arising in the winding up of *Overend, Gurney, and Company*, is in conformity with this view, and has established it as law. It

Rights of creditors.

Oakes' case and Peek's case.

(y) *Ante*, 542-45.

(z) *Ante*, 1297.

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was there held, that where the prospectus of a company formed and registered under the Companies act, 1862, had been issued, and such prospectus was expressed in terms calculated to deceive those who read it with respect to the true position of the company, the issuing of the prospectus was in point of law a fraud on the part of the company, and that such fraud entitled persons taking shares directly from the company on the faith of such prospectus to repudiate their shares (*a*); but that they were, nevertheless, liable to be placed on the list of contributories of the company, it being proved that the creditors of the company would otherwise remain unpaid (*b*).

This important decision has been followed in other cases (*c*), and has rendered the older authorities of comparatively small importance upon the immediate question under discussion. But as they throw great light on the extent to which companies are affected by the statements of their directors and officers, and upon the rights of shareholders *inter se*, the following notice of them will, it is hoped, be found useful.

Summary of cases under the older acts.

1. *Persons held not to be contributories, they having been induced to take shares by the fraud of the company.*

Ginger's case.

Ginger's case (*d*) is an important Irish case, decided in winding up the Tipperary Bank. In that case the managing director of the bank, acting without authority, and in violation of the bank's deed of settlement, issued a number of shares, entered them in the share register book in the name of A., and debited him with their price. Of this proceeding A. was ignorant. In

(*a*) This part of the judgment accords entirely with the decision of the House of Lords, in *Central Rail. Co. of Venezuela v. Kish*, L. R. 2 App. Ser. Ho. Lo. 99. See *ante*, 938.

(*b*) *Oakes' case*, and *Peek's case*, L. R. 3 Eq. 576. Oakes took his shares directly from the company. Peek bought his from a previous shareholder. Both were put on the

list.

(*c*) *Smith's case*, 2 W. N. 106, where Smith was put on the list, notwithstanding the decision in his favour, in *Smith v. Reece River Co.*, L. R. 2 Eq. 264, noticed *ante*, p. 939. It has also been followed by the M. R. in cases arising in winding up Barned's bank.

(*d*) 5 Ir. Ch. Rep. 174.

order to induce persons to take these shares, the director issued a flourishing report, prospectus and balance-sheet, in which there was not a word of truth; he placed these documents in the hands of a friend, who did not know them to be false, and induced him to endeavour to sell the shares. The friend in question employed agents equally innocent with himself, to induce people to take shares, and such agents were furnished with the false and fraudulent documents above alluded to. Ginger was induced by one of these agents, and by the false documents produced by him, to purchase shares; and A. was induced by a trick on the part of the director to sign transfers to Ginger, who accepted the shares, and was registered as a shareholder in respect of them. Ginger was held not to be a contributory: first, because the shares transferred to him ought never to have been issued or transferred to him at all (e); and secondly, because he was induced to purchase them by a gross fraud, imputable to the company. Upon the question of fraud it was considered, that if shareholders choose to adopt, and seek to enforce the contract of a director, and say that he was their authorised agent to enter into it, they cannot repudiate the frauds of the agent which led to the contract, and which are immediately connected with, and the foundation of, the very transaction which is sought to be enforced.

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Brockwell's case (f), which arose in the course of winding up the Royal British Bank, was substantially as follows: The bank was formed in 1849, under 7 & 8 Vict. c. 113. Annual reports were made by the directors to the shareholders, and such reports were from the very first false, to the knowledge of most, if not of all, of the directors. In December, 1854, the company was hopelessly insolvent, and the directors knew it. They nevertheless prepared a report, and laid it before a general meeting of shareholders, held in February, 1855, and in such report represented the company to be in a flourishing condition. In this same month the directors, by false representations as to the state of the company, induced the Board

Brockwell's case.

(e) But see as to this, *Richmond's case*, and *Painter's case*, 4 K. & J. 305, where a person who had taken shares issued without authority and

fraudulently, was held a contributory.

(f) 4 Drew. 205.

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of Trade to grant the company a supplemental charter, and to authorise the increase of its capital by the issue of new shares. The report made to the shareholders in February, 1855, was advertised in the newspapers, and was to be seen at the company's office, and there Mr. Brockwell saw it. Upon the faith of this report he took shares in the company from the company itself; he paid up his capital and received dividends. In September, 1855, the company was ordered to be wound up. The frauds committed by the directors, and the falsity of their reports and representations, were then discovered. It was admitted that Brockwell would have been a contributory had there been no fraud; but it was contended on his behalf, and held, that he had been induced to take shares in and from the company by the fraud of the company, and that he was therefore not a contributory, and his name was struck off the list, with costs to be paid by the company.

Observations on
these cases.

These cases are frequently regarded as inconsistent with, and in effect overruled by *Nicol's case* (g): indeed the V.-C. Kindersley, who decided *Brockwell's case*, appears himself to have regarded it as overruled (h). But it would be a mistake to infer from *Nicol's case*, that if false and fraudulent reports are published by the directors of a company in order to induce persons to take shares in it, persons who, on the faith of such reports, do take shares from the company are contributories. No decision has yet gone this length. All that *Nicol's case* decided was, that a company could not be affected by the use one of its directors might make of a report which had been laid before, and adopted by a meeting of shareholders (i). In so far as *Ginger's case* and *Brockwell's case* are opposed to this decision, they may be considered as overruled by it; but the broad principles on which they proceeded may, it is conceived, still be relied upon, and have been recognised and acted upon in other cases.

Bell's case.

Bell's case (k). In this case the secretary of a company had, by the authority of its directors, issued circulars in which the affairs of the company were falsely and fraudulently represented

(g) 3 De G. & J. 387, *infra*, 1382. 415, *infra*, 1382.
See, also, *Mixer's case*, 4 ib. 575. (i) *Infra*, 1382.
(h) *Barrett's case*, 2 Dr. & Sm. (k) 22 Beav. 35.

to be in a flourishing state. Such circulars were issued for the purpose of inducing the public to take shares. Mr. Bell took shares on the faith of the statements contained in the circulars. He obtained such shares directly from the company, which was shortly afterwards ordered to be wound up. The fraud which had been committed was then discovered, and Mr. Bell repudiated his shares. He was held not to be a contributory, although he had executed the company's deed.

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Ayre's case (l). In this case *The Deposit and General Life Assurance Company* was desirous, in March, 1854, of issuing new shares. The company had a manager in London and an agent in Bristol. The Bristol agent applied to Mr. Ayre to take shares, and produced to him the company's deed of settlement, also a list of the original shareholders, who were described as holding 10,550 shares, and as being persons of considerable property, and also a report made by the directors of the company, and representing the affairs of the company to be in a flourishing state. This report was false. The list of shareholders also contained many material false statements. The documents shown to Mr. Ayre had been sent from London for the express purpose of being laid before him; and on the faith of those documents, and of the statements made to him both by the Company's London manager and by its Bristol agent, Mr. Ayre was induced to take 200 of the new shares, and to sign the company's deed in respect thereof. He afterwards, however, had reason to suspect that he had been imposed upon, and he then repudiated his shares, and refused to pay a call made upon him. He further defended an action brought against him for such call, pleading fraud as a defence to the action; at the trial, however, the evidence adduced by him to prove the fraud was not satisfactory, and the company obtained a verdict, and he was compelled to pay the amount of the call, together with interest and costs. On the subsequent winding up of the company he succeeded in establishing the facts already mentioned, and it was accordingly held that he was not a contributory, and that the verdict of the jury was not conclusive upon the question of fraud. The judgment in this question

Ayre's case.

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deserves attentive perusal, and is an authority for the proposition that companies cannot be heard to say they did not know that their own reports were untrue.

Blake's case.

Blake's case (m). There the secretary of the company sent to its brokers prospectuses of the company for distribution. The prospectus represented that several persons were directors of the company. The brokers were informed by the secretary that the shares taken by the directors and others exceeded the number set apart for persons in London and the neighbourhood, and that the London share list was closed; but that shares might still be had by persons residing in the country, and applying through country brokers. Advertisements to this effect were also published in the newspapers. This information was conveyed by the brokers to Blake, to whom they sent a prospectus. He bought some shares in the company on the faith of the above statements; but his suspicions being aroused by the low numbers on the scrip certificates sent to him, he made inquiries and discovered that the London share-list was still open, and that there was no difficulty in obtaining shares in London, and that three out of the eleven directors named in the prospectus had no shares in the company. Blake immediately repudiated his shares, and demanded back the money he had paid for his shares; and it was returned to him, and a line was drawn through his name on the register. Two calls were afterwards made, but he was not required to pay either of them. On the subsequent winding up of the company, he was held not a contributory. The decision proceeded on the ground—1, that Blake had been induced by fraud to apply for shares, and that such fraud affected the company; and 2ndly, that he had repudiated the shares as soon as he had discovered the fraud, and such repudiation had been acquiesced in by the company.

Oake's case

The judgment of the V.-C. Malins in *Oakes' case (n)*, is another strong authority in support of the principle on which the three last cases were decided. Had *Oakes' case* arisen under the older winding up acts he would have succeeded in having his name removed from the list of contributories.

(m) 34 Beav. 329.

(n) L. R. 3 Eq. 573, ante, pp. 1375—6.

2. *Persons held to be contributories.*a) *Fraud not imputable to the company.*

Although directors are agents, and although, for reasons already submitted to the reader (o), it is conceived that a company must be civilly answerable, even for false and fraudulent statements, if they emanate from its directors and relate to matters as to which the directors are the agents of the company, and are made in the course and as part of the business which the directors are appointed to transact for the company, still a company cannot be held responsible for whatever any of its directors or officers may do or say on its behalf or with reference to its affairs. It has already been pointed out that each of several directors is not, apart from the rest, the agent of the company at all (p); that general powers of binding the company, are not incidental to particular offices (q); and that a company is in no case responsible for what is done by its agents, acting not as such, but as principals (r). These considerations will, for the most part, suffice to distinguish the cases noticed in the last section, from those to which it is proposed now to allude.

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Even where a person has taken shares in a company on the faith of a false and fraudulent report of the directors of the company, he will nevertheless be contributory if such report was not issued or published by the directors, or by their authority, otherwise than by being laid before the shareholders and by being sent to them. The subsequent production of such a report to a person in order to induce him to take shares in the company, is not such a use of the report by the company as to render the company guilty of a fraud upon him, even although the report may have been produced to him by a director or some officer of the company.

Fraudulent
reports.

The leading authority on this head is *Nicol's case* (s), which may be regarded as an appeal from the decision in *Brockwell's case* (t).

(o) *Ante*, pp. 322, *et seq.*

(p) See *ante*, p. 322.

(q) See *Burnes v. Pennell*, 2 Ho. Lo. Ca. 497, *ante*, p. 327.

(r) *Ante*, p. 341.

(s) *Ante*, p. 327; and *infra*, 1382.

(t) *Ante*, p. 1377.

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Nicol's case.

In *Nicol's case* (*u*), Nicol had taken shares in the Royal British Bank, in March, 1855, on the faith of the same reports as had induced Brockwell to take his. Brockwell had seen the reports at the bank. Nicol was shown them by a director, who made additional statements as to the flourishing condition of the bank. The Vice-Chancellor held Nicol not to be a contributory, he having been induced, by the fraud of the company, to take the shares in question. The Lord Chancellor dissented from this view, and expressed a strong opinion that companies are not responsible for the frauds of their directors; the Lord Justice Knight Bruce was not satisfied that the Vice-Chancellor's view of the case was correct; and the Lord Justice Turner, although differing in many respects from the Lord Chancellor, agreed with him in thinking that Nicol, having had no communication with the directors as a body, but having dealt with one of them only, was not in a position to say that he had been defrauded by the company. The whole Court, however, agreed that Nicol's name ought to be struck off the list of contributories, he having effected a valid transfer of his shares. Upon this point the case has been referred to already (*v*).

Holt's case.

Holt's case (*x*). The managing director of a company induced Holt to become a director, to take shares, and to sign the company's deed, by misinforming him as to the position and prospects of the company, and producing a flourishing but false prospectus. Holt was held a contributory.

Barrett's case.

Again, it was decided by the V.-C. Kindersley in *Barrett's case* (*y*), that, where directors made a false report to a meeting of shareholders, and the meeting adopted the report, and it was afterwards sent to each shareholder, no shareholder could treat that report as a fraud by the company on himself. Consequently, a shareholder who, on the faith of such report applied for and obtained more shares in the company, was held to be a contributory in respect of them.

In the following cases, persons who had been induced to take shares in a company by the fraud of some individual

(*u*) 3 De G. & J. 387. See, also, *case*, 5 Jur. N. S. 7, *infra*, p. 1386.
Mixer's case, 4 ib. 575. (*y*) 2 Dr. & Sm. 415, and 3 De

(*v*) *Ante*, p. 1349.

G. J. & Sm. 30.

(*x*) 22 Beav. 48. See, too, *Bigge's*

connected with the company, were held contributories. After what has preceded they will be found to offer little difficulty.

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Bernard's case (z). *Bernard* being desirous of purchasing shares in a company, applied to the manager for information as to its circumstances, and was told, amongst other things, that dividends were being paid. He took fifty shares, which were in fact, although he did not know it, issued by the directors. He received dividends for three years, and was held a contributory, although the company was insolvent when he took the shares.

Bernard's case.

Gibson's case (a). In this case *Gibson* had been induced by a promoter of a company to take shares in it, and to sign its deed of settlement in respect of such shares, upon the assurance of the promoter that two other persons would do the same. These two persons, however, refused to join the company, and *Gibson* then repudiated his shares. He was afterwards informed by the promoter, with whom he had dealt, that such shares had been transferred, which, however, was not true. *Gibson* was held to be a contributory. In this case there was in truth no fraud inducing him to take shares; for the persons who were stated to be willing to sign the deed and become directors were at the time believed to be willing to do so. Further, there was nothing to show that the promoter, with whom alone *Gibson* dealt, ever acted otherwise than in his individual capacity.

Gibson's case.

Woollaston's case (b). Dr. *Woollaston* was requested by one of the directors of an insurance company to become one of its medical referees, and was told that there would be only two. Dr. *Woollaston* applied for the appointment, and his application was accepted. The appointment appears to have been made without qualification, but to have been confirmed upon

Woollaston's case.

(z) 5 De G. & S. 283. The fraud here consisted in the payment of dividends out of capital, rather than in the statement of the manager. The Court does not seem to have been satisfied that there was any *dolus dans locum contractui*.

(a) 2 De G. & J. 275. *Kemp's case*, and *Hudson's case*, reported in

the same place, are not distinguishable from *Gibson's*.

(b) 5 Jur. N. S. 617, V.-C. K., affirmed on the point of fraud, 4 De G. & J. 437. On appeal, Dr. *Woollaston* was held not a contributory, his shares having been forfeited.

See, as to this, *ante*, p. 1372.

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the condition that the appointee should sign the company's deed for 200 shares, and that the appointment should date from the day on which he signed it. The secretary of the company assured Dr. Woollaston that only two referees would be appointed; that every officer of the company had 200 shares in it; and that he must take a like number. On the faith of these representations Dr. Woollaston signed the deed for 200 shares. He acted for the company for some little time, but having afterwards discovered that two other referees had been appointed, he tendered his resignation, and demanded back the money he had paid for his shares. This demand, however, was not complied with. The statement made by the secretary as to the number of shares held by the other officers of the company was false; but, on the winding up of the company, it was held that there was no such fraud as to relieve Dr. Woollaston from his liability to be a contributory. Upon this case it may be observed, First, that even supposing the company to have promised that there should be only two medical referees, a breach of its promise in that respect could hardly have entitled Dr. Woollaston to demand back his shares (*c*); and, secondly, that, even if the statement by the secretary, that all the other officers had 200 shares, was imputable to the company, it would not amount to such a fraud as would avoid the contract entered into by Dr. Woollaston, for he, at all events, was required to take that number.

Ex parte Worth.

Ex parte Worth (*d*). In this case the shareholders of a company had resolved on issuing preference shares, which they had no right to do. A certain number were taken by a director, and he sold some of them to a lady, who accepted them, and signed the company's deed in respect of them. She was held to be a contributory, for there had been no dealing whatever between her and the company; she was not induced to take any shares by any representation made to her by the

(*c*) But compare on this head, *Coleman's case*, 1 De G. J. & S. 495; *ante*, p. 1336.

(*d*) 4 Drew. 529. See as to shares issued without authority,

ante, p. 1306; and as to shares purchased from shareholders, and not obtained directly from the company, see the next page.

company, or made by the company to the public, and which she had a right to take advantage of as one of the public.

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Frowd's case (e), is another case of the same class. *Frowd* was induced to take shares by the representations of one of the company's clerks, and was held a contributory.

Frowd's case.

Sheffield's case (f) may be referred to as an authority, to the effect that a person who takes shares in a company, and signs its deed, is a contributory, although the effect of that deed may have been misrepresented to him by the officers of the company.

Sheffield's case.

b) *Fraud by a person not a party to the contract.*

Inasmuch as a contract between two persons cannot be rescinded by either on the ground that he was induced to enter into it by the fraudulent representations of a stranger, it follows that if a shareholder in a company sells his shares to a person who accepts them, and is accepted by the company as a shareholder in respect of them, the purchaser will be a contributory, although he may have been induced to buy the shares by false and fraudulent reports issued by the directors of the company (g). The fraud of the company is not imputable severally to each of the persons composing it; and the purchaser cannot, therefore, repudiate his shares on the ground that he was induced to take them by the fraud of the seller. This explains several cases in which purchasers of shares in companies paying large dividends when they were in fact insolvent, have, nevertheless, been held to be contributories (h).

Case of person
buying shares
from a share-
holder.

(e) 9 W. R. 328, V.-C. K.

see the next note.

(f) Johns. 451, and *infra*, 1386. See, too, *Blackburn's case*, 8 De G. Mac. & G. 177; *Conybeare v. New Brunswick, &c., Co.*, 7 Ho. Lo. Ca. 711, noticed *ante*, p. 993.

(g) *Duranty's case*, 26 Beav. 182; *Ex parte Worth*, 4 Drew. 529; *Sanderson's case*, 3 De G. & S. 66; *Peak's case*, L. R. 3 Eq. 576; and

(h) *Bigge's case*, 5 Jur. N. S. 7; *Burnes v. Pennell*, 2 Ho. Lo. Ca. 497. *Bernard's case*, 5 De G. & S. 283, *ante*, p. 1383, is partly but not wholly explicable on this principle, for fifty of the shares in respect of which Bernard was a contributory were issued by the directors.

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Case of person
not induced to
take shares by
the fraud in
question.

Bigge's case.

c) Fraud of the company not the cause of the contract.

Although fraudulent reports may have been issued and published by the directors of a company, no person can rely upon them as a ground for repudiating shares taken by him in it, unless he was induced to take the shares by such reports. *Bigge's case* (i) may be usefully referred to on this head. There a young man of the name of *Bigge*, having money and nothing to do, was induced by his uncle and friends to become a director of a company. He was told that to do so he must take a certain number of shares in it. His uncle was himself a director, and transferred to him the necessary number of shares. The company was paying dividends; it had issued reports which contained untrue representations of the state of its affairs; and it was, in fact, insolvent. But the shares were not taken on the faith of these reports, nor upon the faith of any representations attributable to the company, and *Bigge* was therefore held to be a contributory (j).

d) Shares not repudiated when fraud was discovered.

Effect of not re-
pudiating shares
on discovery of
fraud.

A person induced to take shares in a company by the fraud of the company, will be a contributory if, knowing or having the means of discovering the fraud, he nevertheless continues to hold his shares. A leading case on this head is *Sheffield's case* (k).

Sheffield's case.

There a person had been induced to take shares in a company, on the assurance of its manager and of its cashier that no risk would be incurred if he paid up his shares in full. He accordingly took shares, signed the company's deed, and paid up his shares in full. The deed, when he signed it, contained a clause limiting the liability of the shareholders to the

(i) 5 Jur. N. S. 7. See, too, *Longworth's case*, 7 W. R. 483, where the shares were taken before the fraud was committed.

(j) See, too, *Sanderson's case*, 3 De G. & S. 67, and 3 Ho. Lo. Ca. 698, where the company accepted a purchaser of shares as a shareholder,

although it was on the eve of bankruptcy.

(k) Johns. 451. See, too, *Mixer's case*, 4 De G. & J. 575; *Brigg's case*, L. R. 1 Eq. 843, where there was an attempt to sell the shares. *Jopp's case*, 2 Weekly N. 121.

amount of their unpaid-up capital. This clause had been fraudulently inserted in the deed, so as apparently to form part of it, and was fraudulently withdrawn from the deed before it was registered. He, however, never read the deed. The company carried on its business for several years, and the shareholder in question, who had never had his attention called to the difference between the deed as registered and the deed as signed by him, received dividends and attended meetings as a shareholder. After the lapse of more than four years, the company was ordered to be wound up, and it was then that the fraud above mentioned was discovered. The shareholder contended that he had never become a shareholder in the registered company; or if that he had, he had been induced to become so by the fraud of the company. But it was held that it was not open to him to say he did not know the contents of the registered deed; that other people were entitled to say they had acted on the faith of it; and that he could not escape from being made a contributory (1). The shareholder in this case was held liable, mainly upon the ground that he might have known, and, in fact, was bound to know, the contents of the registered deed. Treating him, therefore, as acquainted with those contents, although ignorant of the fraud which had been perpetrated, his acts amounted to an adoption of shares in the registered company. The only question which could then arise would be, whether he was entitled to be indemnified by the company against loss, he having been told by the manager and one of the directors, that he would not be liable beyond the extent of his paid-up capital. Such a statement as this, however, could not affect the company; for, so far as the statement was true, it added nothing to what might have been learnt from the deed itself; and so far as it was false, it was made by persons who certainly were not the agents of the company to explain the legal effect of its deed of settlement.

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(1) Other persons who had signed the deed whilst the limited liability clause was part of it, were held not to be contributories; but the cir-

cumstances distinguishing their cases from *Sheffield's* do not appear. See *Cox's case*, and *Naylor's case*, mentioned in 4 K. & J. 314.

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Other cases.

Mixer's case (m), *Brigg's case* (n) *Dixon's case* (o), and *Jopp's case* (p), are other and more recent instances in which persons were held to be contributories, upon the ground that, whatever their position might otherwise have been, they had not repudiated their shares in time. Upon this head, reference may also be made to the cases already noticed, when considering the effect of delay in repudiating shares where there has been a change in the objects of the company (q).

e) *Fraud not material.*

Case where, notwithstanding fraud in the issue of shares, the holders cannot repudiate them.

Moreover, even if a person has been induced to take shares in a company by the fraud of the company, still, if he has got all he bargained for, and the fraud consisted in a mere assumption by the company of a right to give him what he has had, and if, further, the company is precluded from disputing the right it has so assumed to give, then he will be a contributory. It is upon this principle that innocent holders of shares which the company had no authority to issue, are held contributories in respect of such shares (r).

f) *Effect of other persons taking shares on faith of others being shareholders.*

Effect of person taking shares on the faith that others are shareholders.

If a shareholder has been induced to take shares in a company by the fraud of the company, and since he took such shares other persons have taken shares on the faith of his being a shareholder, it is, to say the least, doubtful whether he can escape being made a contributory. In the case now supposed there are three alternatives, viz., 1, to hold that he, and consequently they, are entitled to repudiate their respective shares; 2, to hold that they, and consequently he, must be treated as shareholders; 3, to distinguish between his case and theirs, and whilst holding him at liberty to repudiate, to hold them bound.

(m) 4 De G. & J. 575.

(n) L. R. 1 Eq. 483, where the shareholder had attempted to sell his shares after discovering the fraud. See, as to this, *ante*, p. 1342.

(o) 2 Weekly N. 53, where there

was a delay of two years after suspicion was aroused.

(p) *Ib.* 121.

(q) *Ante*, p. 1343.

(r) *Ante*, p. 1306.

Of these alternatives, the last was adopted in *Richmond's case* and *Painter's case* (t). There persons had been induced to take shares in a company, the deed of settlement of which was materially altered after they had signed it. Other persons had taken shares in the same company, and had executed the deed in the state in which it ultimately remained, and whilst the persons first referred to were shareholders. The first set of shareholders were held not to be contributories; but the second set were held to be contributories, although it was contended on their behalf, that they had only agreed to join a company in which the first set were shareholders in reality as well as in appearance.

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Richmond's case.
Painter's case.

Upon this case it is to be observed that there was no evidence showing that in point of fact the second set of shareholders had been induced to take shares in the belief that the first set were shareholders; for it does not appear that the shareholders held to be contributories, knew who, in particular, had signed the company's deed before they signed it themselves. If the facts had in this respect been different, *Sheffield's case* goes far to show that all the persons defrauded would have been contributories (u).

Such cases as those last adverted to must not be confounded with *Parbury's case* (x), in which it was held that a person induced to take shares in a company on the faith of its prospectus, which contained false and fraudulent statements, was nevertheless a contributory, inasmuch as it was reasonable to suppose that there were other persons, equally innocent with himself, and with whom, therefore, he was liable to contribute. Now it is conceived that if these other persons had, like himself, been induced to take shares on the faith of the company's prospectus, the only consequence would be that they and he might all have repudiated their shares. If in such a case some of those deceived do not choose to exercise their right of repudiation, that ought not to prevent the others from so doing. If 100 persons have been equally cheated, and ninety-nine of them are content to abide by their bargain, that is no

Parbury's case.

(t) 4 K. & J. 305.

& J. 284; *Bell's case*, 22 Beav. 35;

(u) *Ante*, p. 1386. Compare the judgments in *Gibson's case*, 2 De G.

Brockwell's case, 4 Drew. 214.

(x) 3 De G. & S. 43.

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reason why the hundredth should be held to his (y). Moreover, under the older Winding-up acts (under which *Parbury's case* was decided), persons entitled to be indemnified by the company ought not to be contributories, simply because they may possibly be called upon to bear debts or losses, for which the company, as between them and it, is primarily responsible. *Parbury's case*, therefore, cannot be considered satisfactory. But this conclusion does not render it more easy to deal with such cases as *Richmond's* and *Painter's case*; for, *ex hypothesi*, in them, those persons who are equally innocent are not in the same position relatively to each other; some of them having become shareholders in the belief that the others had become so first. It is the right of the former against the latter which it is so difficult to determine, and which cannot yet be considered as finally settled by decision.

SECTION XI.—CALLS FOR DEBTS, ETC.

1. Generally.

Calls on contributories.

Having settled the list of contributories so far as he is able, the next thing which the Judge acting in the winding up usually finds it necessary to do, is to make calls on the contributories for the payment of the debts, losses, and liabilities of the company (z).

Purposes for which calls may be made.

Calls may be made :

1. For the payment of the company's debts and liabilities ;
2. For the payment of the costs of winding up ; and
3. For the adjustment of the rights of the contributories amongst themselves (a).

Moreover, in making calls, the probability that some of the

(y) See 4 Drew. 214, in *Brockwell's case*, and 3 De G. & J. 425, in *Nicol's case*.

(z) The power of making calls on the contributories is given by § 102 of the Companies act, 1862. These

calls must not be confounded with calls made under a company's articles of association or deed of settlement. See *ante*, p. 619.

(a) § 102. See, also, §§ 38, 196, cl. 5, and § 200.

contributories will fail to pay the full amount due from them may be taken into consideration (b). Bk. IV. Chap. 3.
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With respect to the time for making calls, and the amount to be raised, the Companies act, 1862, gives the judge a wide discretion (c); and he is, to a great extent, guided by the liquidator's view of what is required (d). Moreover, the court of appeal is very reluctant to interfere with the discretion of the judge upon such a question, as whether the time has arrived for making a call, or as to the amount for which it should be made (e). A call can only be made upon persons who are settled on the list of contributories (f); but it is not necessary to wait until the list is completed (g); nor until the assets of the company have been realised or have been ascertained to be insufficient to discharge its liabilities (h); nor until the claims against the company have been established (i). Time and amount
of calls.

Applications to the judge to make a call are made by summons, stating the proposed amount of the call (k). The summons must be served four clear days at least before the day appointed for making the call on every contributory proposed to be included in it (l). Notice of the intended call may, however, be given by advertisement if the judge so directs (m). The application for a call must be supported by affidavit, which in ordinary cases is made by the official liquidator (n). Practice as to
calls.

When an order for a call is made, a copy of it must be served upon each of the contributories included in it, together with a notice specifying the balance due from him in respect Order for a call.

(b) § 102.

(c) *Ib.*

(d) See *The Contract Corporation*, L. R. 2 Ch. App. 95.

(e) *Ibid.*, and *Barned's Banking Co.*, 2 Weekly N. 51.

(f) See the act, § 102.

(g) *Ibid.*, *Barned's Banking Co.*, 2 Weekly N. 25 and 51. See *Underwood's case*, 5 De G. Mac. & G. 677, where the list was in such a state that it was held no call could

be made.

(h) § 102. *Gay's case*, 1 De G. Mac. & G. 347; *Greenwood's case*, 3 ib. 459.

(i) *Contract Corporation*, L. R. 2 Ch. App. 95, noticed *infra*.

(k) See Rule 33.

(l) *Ib.*

(m) *Ib.* See the forms in the Rules, schedule 3, Nos. 34—37.

(n) See *ib.* No. 33.

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Balance order.

of such call (*o*). If this notice states that interest will be charged in case of non-payment on the day named, such interest will be payable (*p*). The order need not be advertised unless the judge so directs (*q*). If default is made by any contributory in payment of the sum which he has thus been required to pay, another and special order, called a balance order, is made, requiring him to pay what is due from him within four days after service (*r*). Upon non-compliance of this order it may be enforced in the way in which orders in Chancery suits are usually enforced (*s*), *i.e.*, by *fi. fa.*, &c., or by attachment and sequestration (*t*). A writ of *ne exeat regno* to prevent a contributory from absconding without paying a call made upon him will be granted on motion *ex parte* (*u*).

Calls made in the winding up of a company are specialty debts (*x*), and provision is made for obtaining their payment out of the real as well as out of the personal estates of deceased contributories (*y*); and the liability to a call is considered as commencing at the time when the shares in respect of which they are made were taken (*z*). Calls may be proved against the estate of bankrupt contributories (*a*).

An order for payment of a call may be registered (*b*), and

(*o*) See rule 34, and the forms in the schedule, Nos. 36 and 37. As to the mode of service, see § 63; as to substituted service, see *Ellis's case*, 3 De G. & S. 172. In *Ex parte D'Urban*, 18 Jur. 781, notice sent by post to a person abroad was held good, though it reached him after the day appointed for payment. As to the affidavit of service, see *Natle Slate Co.*, 7 W. R. 319; *Re Job*, 27 Beav. 32.

(*p*) *Ex parte Lintott*, 2 W. N. 118.

(*q*) Rule 34.

(*r*) Rule 35, and see the forms in the schedule, Nos. 38 and 39.

(*s*) See the act, § 120. As to enforcing orders in Scotland, see § 121.

(*t*) *Ante*, 1268.

(*u*) *Mawer's case*, 4 De G. & S. 349. See *Jackson v. Petrie*, 10 Ves. 164.

(*x*) See the act, § 75. It was otherwise under the older acts. See *Ex parte Robinson*, 6 De G. Mac. & G. 572.

(*y*) *Ib.*, §§ 105 and 106, and see § 76. As to enforcing payment of a call out of the assets of a deceased Scotch shareholder, see *Wryghte v. Lindsay*, 3 McQueen, 772.

(*z*) *Ib.* § 75. *Ex parte Canwell*, 4 New R. 39. Compare *Williams v. Harding*, L. R. 1 App. Ser. Ho. Lo. 9.

(*a*) See as to this, *ante*, pp. 1160, 1198, and 1319.

(*b*) *Ex parte Thomas*, 9 C. B. 740.

may be made the foundation of a charging order, under 1 & 2 Vict. c. 110 (c). Bk. IV. Chap. 3.
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The proceeds of a call made to pay a creditor of the company may be attached under the Common law procedure act, by his judgment creditors (d).

An order for a call may be appealed from by any contributory on whom it is made (e), and he may, on the appeal show, if he can, that although his name is on the list of contributories, it ought not, in truth, to be there at all (f). But he will not be allowed to go into this matter if any considerable time has elapsed since his name was settled on the list, or if he has acquiesced in being made a contributory (g). Appeal from
order.

Where a person is settled on the list, and a call is made upon him, and he resists payment on the ground that he is not a contributory, he should apply to have his name removed from the list, and to have the proceedings to enforce payment of the call stayed; he must, however, be prepared to pay the call into court (h).

The power of liquidators to effect compromises with contributories has already been alluded to (i).

2. Calls for debts.

The proper mode for providing funds for the payment of a debt due from a company which is being wound up is by making a call on its contributories, and not by ordering them to pay the debt (k).

(c) *Re Connell*, 25 L. J. Ch. 649. The order in this case was made by an equity judge. See *ante*, p. 693.

(d) See *Prichard's claim, Ex parte Turner and Smith*, 2 De G. F. & J. 354.

(e) See *ante*, p. 1268. *Longworth's Executors' case*, Johns. 461.

(f) *Londesborough's case*, 4 De G. Mac. & G. 411. As to obtaining back money already paid for calls, see *Ex parte Holroyd*, 15 Jur. 696; *Ex parte Day*, 3 Jur. N. S. 1016.

(g) *Underwood's case*, 5 De G.

Mac. & G. 677.

(h) See *Oakes' case*, and *Peek's case*, 1 Weekly N. 361; *London Bank of Scotland*, 2 ib. 114.

(i) *Ante*, p. 1276. It ought there to have been mentioned that in *Cleave v. Harwar*, 6 H. & N. 22, proceedings by *sci. fa.* against a shareholder were stayed, a compromise having been entered into between him and the official manager under 20 & 21 Vict. c. 78.

(k) See *Re Cameron Coalbrook, &c., Rail. Co.*, 30 Beav. 216.

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Right of creditor
to require a call
to be made.

For what debts
calls may be
made.

Contract Cor-
poration.

Under the acts of 1848 and 1849, a creditor of a company was not entitled, as creditor, to require a call to be made for his payment. His remedy, if he had a judgment already, was to enforce it against those individuals who were liable to it, and, if he had no judgment, then to obtain one against the official manager, and enforce it as before (*l*). The persons proceeded against could require a call to be made for their own indemnity, but it was only in this manner that a creditor, as such, could obtain payment under the acts of 1848 and 1849, if driven to his strict rights (*m*). If, however, the creditor was himself a contributory, he was, even under the acts of 1848 and 1849, entitled to require a call to be made for his own payment (*n*), and when creditors became parties to the winding up under the act of 20 & 21 Vict. c. 78, and were thereby disabled from proceeding at law, they were entitled as creditors to require a call to be made for payment of their allowed demands. It is clear that under the Companies act, 1862, a creditor who has established his debt against the company is entitled to have a call made for his payment on those contributories who are liable to calls.

Again, under the acts of 1848-9, it was held, that the only debts for the payment of which calls could be made, were the debts proved against the company which was being wound up (*o*); but that whether the debt was equitable or legal was unimportant (*p*), and that no call ought to be made for providing a fund which might or might not be wanted (*q*). But although the only debts which can properly be paid by means of calls are debts of the company, it has recently been decided in the case of the *Contract Corporation* (*r*), that it is not necessary that they shall be established against the company before calls in respect of them are made. In that case claims to the extent of 850,000*l.* were made against the company, but were

(*l*) See *ante*, p. 1252, *et seq.*

(*m*) See *Thompson v. Norris*, 5 De G. & S. 686; and *Prichard's case*, 5 De G. Mac. & G. 484.

(*n*) *Gleadow v. Hull Glass Co.*, 15 Beav. 200.

(*o*) See *Wryghte's case*, 2 De G.

Mac. & G. 636; and see *Marylebone Bank*, 18 Jur. 281.

(*p*) *Terrell v. Hutton*, 4 Ho. Lo. Ca. 1091.

(*q*) *Marylebone Bank*, 18 Jur. 281.

(*r*) L. R. 2 Ch. App. 95.

all disputed, and the liquidator estimated that about half of them could be established. A heavy call was made in order to provide for those debts which it was considered would have to be met, and the Court of Appeal refused to discharge it. The Court considered that it did not follow that because debts were contested a call was not to be made to provide the means of paying them if they should be established; and further, that as creditors could not sue the company without the leave of the Court, the Court ought not to refuse that leave without providing a fund for their payment in the event of their ultimately establishing their claims.

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Further, under the Winding-up acts of 1848-9 it was held, that before a call could be made on any particular contributory settled on the list, his liability to contribute (*s*) to the debt to pay which the call was made, must have been established (*t*); for it by no means follows that every person settled on the list is liable to all the calls which it may be necessary to make in the course of winding up the company (*u*). Thus, if debts had been incurred by the directors, and such debts were proveable against the company, but ought, as between the directors and the shareholders, to be borne by the former, the call for the payment of those debts must have been first made on the directors exclusively. This was held where the directors had expressly guaranteed the shareholders against all loss (*x*); where the debts in question had been incurred by the directors in excess of the authority reposed in them (*y*); and where they had been contracted by the directors, who had fraudulently obtained a covenant for their own indemnity (*z*).

Liability of contributory must be established before a call is made on him.

(*s*) Direct liability to creditors was not the test of liability to calls under the Winding-up acts of 1848-49. *Hopkinson's and Underwood's case*, 7 De G. Mac. & G. 193.

(*t*) *Upfill's case*, 1 Sim. N. S. 395; *Hunter's case*, ib. 435; *Marylebone Bank*, 18 Jur. 281.

(*u*) See 2 Mac. & G. 67, per Lord Cottenham.

(*x*) *Mowatt and Elliott's case*, 3

De G. Mac. & G. 254, reversing *Ex parte Mowatt*, 1 Drew. 247; *Londesborough's case*, 4 De G. Mac. & G. 411.

(*y*) *Ex parte Cropper*, 1 De G. Mac. & G. 147; *Worcester Corn Exchange Co.*, 3 ib. 180. Compare *Ex parte Chippendale*, 4 ib. 19, and *Ex parte Bignold*, 22 Beav. 143.

(*z*) *Carew's case*, 7 De G. Mac. & G. 43.

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In applying these decisions to companies which are wound up under the Companies act, 1862, the difference between the position of creditors under that act and the older acts must again be borne in mind. The proper mode of dealing with such cases as the above under the act of 1862, would probably be to make a call on all the contributories and to pay the creditors, and afterwards adjust the rights of the contributories *inter se* (a).

3. *Calls for the adjustment of the rights of the contributories.*

Calls for adjustment of rights of the contributories *inter se*.

It is the duty of the judge acting in the winding up, to adjust and finally settle all cross claims between the contributories (b); but this does not preclude him from making a call on them all alike, and from afterwards adjusting such inequalities of payments as on taking the whole of the accounts between them may be found to exist. If, for example, several of the contributories have already paid to the company more than others, who ought to have paid as much as they, a call may nevertheless be made on all alike if it is necessary to raise a fund at once for defraying some loss or expense to which they are all liable; the temporary injustice produced by such a call may be set right afterwards (c). At the same time, such temporary injustice ought, if possible, to be avoided; and a call ought not to be made on the general body of contributories if it appears that any of them are indebted to the company in sums which can readily be recovered, and which, if recovered, would render the call unnecessary (d). Therefore, if some of the contributories are entitled to be indemnified by others against particular losses or debts, calls for the payment

(a) See the judgments in the *Contract Corporation*, L. R. 2 Ch. App. 95.

(b) See as to this, *Marylebone Joint Stock Bank Co.*, 25 L. J. Ch. 650, V.-C. Kindersley; *Ex parte Perrier*, 7 Ir. Ch. Rep. 256; *Ex parte Dayrell*, and *Ex parte Lowndes*, 1 Jur. N. S. 1129.

(c) See *Gay's case*, 5 De G. & S. 122, and 1 De G. Mac. & G. 347; *Preece and Evans' case*, 2 De G. Mac. & G. 374.

(d) *Gay's case*, 1 De G. Mac. & G. 357; *Underwood's case*, 5 ib. 677. See, too, *The Marylebone Bank*, 18 Jur. 271.

of such losses or debts ought, in the first instance, to be made exclusively on the last class of shareholders (*e*).

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If in an unlimited company there are two classes of shareholders, viz., holders of shares paid up, and holders of shares not paid up, the latter ought to be called upon to pay up their shares before any call is made on the former (*f*); but if so-called *paid-up* shares have been issued improperly, then they must be treated as if they were shares, the whole amount of which is due to the company, and their holders must pay calls accordingly (*g*). Again, in limited companies where some of the shares are paid up in full but others are not, calls may be made on the holders of the unpaid-up shares in favour of the holders of the paid-up shares, in order to put all the shareholders on an equality (*h*).

Paid-up and unpaid-up shares.

In settling the cross claims of contributories, a call may, if necessary, be made on a contributory otherwise than in respect of the shares standing against his name in the list of contributories. For example, where directors are liable to make good losses incurred by their own fraudulent conduct, and there is any difficulty in raising the requisite amount by a call on all the directors in proportion to their respective shares, the shareholders have a right to insist on a call for the whole amount being made exclusively on those, or that one, of the directors who may be able to pay (*i*).

Calls on a contributory otherwise than in respect of his shares.

(*e*) *Mowatt and Elliott's case*, 3 De G. Mac. & G. 254, reversing *Ex parte Mowatt*, 1 Drew. 247; *Londesborough's case*, 4 De G. Mac. & G. 411. Compare *Walker's case*, 8 ib. 607. See, too, *Carew's case*, 7 De G. Mac. & G. 43, where directors were held bound to indemnify shareholders who had been induced by fraud to covenant to indemnify them.

(*f*) See last note but one.

(*g*) *Daniell's case*, 1 De G. & J. 372, and 23 Beav. 568; *Nickoll's*

case, 24 Beav. 639.

(*h*) *Anglesea Colliery Co.*, L. R. 2 Eq. 379; *Crookhaven Mining Co.*, ib. 3 Eq. 69.

(*i*) See *Ex parte Perrier*, 7 Ir. Ch. Rep. 256, where one contributory had to pay the whole value of nominally paid-up shares which had been fraudulently obtained by him from the company, and had been afterwards given by him to the directors who enabled him to commit the fraud.

4. *Limit of liability to calls.*

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Extent of liability to calls.

1. Where company is not limited.

The extent to which contributories are liable to calls depends, in the first place, on the nature of the company.

If the company is one, the liability of whose members is not limited by the Legislature or the Crown, or by registration as a limited company, the amount of the calls which may be made upon the contributories is limited only by the debts and engagements of the company, and the costs of winding up, and the sums, if any, which may be required for the adjustment of the rights of the contributories amongst themselves.

In those cases in which, by the constitution of the company, the liability of its shareholders, as between themselves, is limited to the amount of their respective shares, a call may be made upon them to the full amount of those shares not already paid up (*k*); and even beyond that amount, if, notwithstanding the constitution of the company, the liability of the shareholders to the creditors is unlimited (*l*). But if the liability of the shareholders is, as between them and the creditors of the company, limited to the amount unpaid up of their respective shares, then no calls for the payment of the debts of the company can be made beyond the same amount (*m*).

2. Where company is limited.

If, on the other hand, the company is one, the liability of whose members is limited by the Legislature, or the Crown, or by registration as a limited company, the amount of calls which may be made upon the contributories cannot exceed the limit imposed by the Legislature or the Crown, or by the Companies act, 1862, as the case may be.

With respect to companies formed and registered under the last-mentioned act with limited liability, the act declares,

By shares.

1. That in the case of a company limited by shares, no contribution shall be required from any member exceeding the

(*k*) *Talbot's case*, 5 De G. & S. 650. 386.

(*l*) *Greenwood's case*, 3 De G. Mac. & G. 459, reversing S. C., 2 Sm. & G. 95. See *Marylebone Joint Stock Banking Co.*, 25 L. J. Ch.

(*m*) *Prince of Wales Life Assur. Society*, Johns. 80, affirmed 3 De G. & J. 660. See, also, the Companies act, 1862, § 38, cl. 6; and *ante*, p. 380, *et seq.*

amount, if any, unpaid on the shares, in respect of which he is liable as a present or a past member (*n*); and

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2. That in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association (*o*). With respect, however, to companies limited by guarantee, and having capitals divided into shares, it is also declared that any share of capital that may not have been called up shall be deemed assets of the company, and be a debt due to the company from each member, to the extent of any sums unpaid on any shares held by him, and shall be payable at such time as the Court may appoint (*p*).

By guarantee.

It must also be borne in mind that, even if a company is limited, still, if it is a banking company issuing notes, the liability of its contributories in respect of those notes is not limited. If necessary, the assets of such companies may be marshalled for the benefit of their general creditors (*q*).

Limited banking
companies.

It has already been seen that a company formed before November, 1862, as an unlimited company, may be registered under the Companies act, 1862, as a limited company (*r*). But such registration does not affect the obligation of the company or its shareholders to discharge in full the debts and liabilities of the company contracted whilst the company was unlimited (*s*); and in a case of this description, it has been decided that calls may be made on the shareholders in the unlimited company, beyond the amount unpaid up on their shares in the limited company (*t*).

3. Company ori-
ginally unlimited
but afterwards
limited.

As regards companies formed and registered under the act, the extent of a contributory's liability to calls depends further on whether at the time of the presentation of the winding-up

Liability of re-
tired members.

(*n*) § 38, cl. 4. As to calls on the holders of fully paid up shares who have received back part of the capital or assets of the company. See *Cardiff Coal Co.*, 2 New R. 562.

(*o*) § 38, cl. 5.

(*p*) § 90.

(*q*) See § 182.

(*r*) *Ante*, 174.

(*s*) The remedy of the creditors

is affected, but not their right to payment. See *ante*, pp. 175, 532.

(*t*) *Garnett and Moseley Gold Mining Co. v. Sutton*, 3 Best & Sm. 321; *Ex parte Stevenson*, 32 L. J. Ch. 97. Compare *Fountain's case*, 11 Jur. N. S. 553, L. C., which turned on the Industrial and Provident Societies act.

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petition he was or was not a member of the company. With respect to retired members the act in substance declares,

1. That no past member shall be liable to contribute if he has ceased to be a member for a year or more before the presentation of the petition for winding up (*u*).

2. That no past member shall be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member (*x*). It would seem from this, that past members are not liable for calls for the costs of winding up.

3. That no past member shall be liable to contribute unless the existing members are unable to pay their contributions (*y*).

As regards companies not formed under the act, whether registered or not, it is obvious that some of the contributories may be liable to calls to a greater extent than others (*z*).

5. *Set-off against calls.*

Set-off against
calls.

If the company is indebted to a contributory on whom a call is made, his right to set off the amount due to him from the call upon him has to be considered. With reference to this subject, it is important to determine whether his claim against the company arises simply from his being a member of the company; or whether it arises from some transaction with the company which would give him a claim against it even if he were not a member. If his claim is of the first description, *e. g.*, if it is a claim to dividends or profits, no set-off is allowed, to the prejudice of the creditors of the company, but the claim must be taken into account in finally adjusting the rights of the contributories amongst themselves, and this applies as well to unlimited as to limited companies (*a*). If, on the other hand, his claim is of the second description, then the ordinary doctrines of set-off apply in his favour if the company is unlimited, but not if it is limited (*b*). In other words, where the company is limited, no set-off is allowed, except to the extent

(*u*) § 38, cl. 1, and § 84.

(*x*) § 38, cl. 2.

(*y*) § 38, cl. 3.

(*z*) See § 196, cl. 5, and § 200;

and See § 206, cl. 3.

(*a*) See § 38, cl. 7, and § 101.

(*b*) *Ib.*

of setting off a call made and payable by a contributory against a dividend payable to him in respect of his debt (*c*); whilst if the company is unlimited, any debt owing by it to a contributory, otherwise than in respect of his shares, may be set off against calls made upon him.

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In this respect the law as to unlimited companies is the same as it was under the Winding-up acts of 1848—9. Under them it was held that where the company was indebted to a contributory otherwise than in respect to his shares (*d*), he might set off the amount of that debt from calls made upon him (*e*); and, if necessary, calls for his reimbursement were made on the other contributories (*f*); and unless their liability, as between him and them, was clearly limited to the amount of their respective shares, it was no answer to a call on them for his indemnity, that they had already paid up their shares in full (*g*).

Where an order is made to wind up a limited company, and the costs are ordered to be paid by the company to the petitioner, he is, it seems, entitled to receive these costs, although he may be a debtor to the company before they are paid (*h*).

Set-off against costs.

SECTION XII.—COSTS.

The costs of winding up a company are usually so large, that the rules relating to their payment are of great practical importance. In fact, it is by no means an uncommon circumstance for contributories to have heavier calls made upon them

Costs of winding up.

(*c*) See *Ex parte Grissell*, L. R. 1 Ch. App. 528, and other cases, noticed *ante*, 1287—9. In *Barrett's case*, 5 New R. 496, L. C., which turned on the acts of 1856-58, a set-off against calls was allowed.

(*d*) See 11 & 12 Vict. c. 45, § 61.

(*e*) *Ex parte Chippendale*, 4 De G. Mac. & G. 19.

(*f*) *Marylebone Joint Stock Bank-*

ing Co., 25 L. J. Ch. 650, V.-C. K. See, too, *Ex parte Dayrell*, and *Ex parte Lowndes*, 1 Jur. N. S. 1129; *Ex parte Sedgwick*, 2 Jur. N. S. 949.

(*g*) *Marylebone Joint Stock Banking Co.*, 25 L. J. Ch. 650.

(*h*) See *The General Exchange Bank*, 2 Weekly N. 148, M. R.

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for the payment of costs than for all other purposes put together. In considering the question of costs, the first point to determine is, what costs are payable by the company, and the next is, how and by whom such costs are to be paid.

First, as to the costs payable by the company.

Costs of petition.

The costs of the petition for winding up a company have been already alluded to (*i*).

Costs of proceeding subsequent to the winding-up order.

The costs of the proceedings subsequent to the winding-up order may be divided into two classes, according as they are or are not incurred in litigation. The non-litigious expenses are borne by the company, unless otherwise directed by the judge acting in the winding up (*k*). But provision is made against burdening the company with the costs of persons who, for their own better protection, desire to attend the winding-up proceedings; they can only do so at their own expense, and if their attendance causes extra expense to the company, such expense may be thrown upon them (*l*).

If the Court orders delinquent directors to be prosecuted, it may order the costs to be borne by the company (*m*).

General rules.

The litigious expenses (or costs in the usual sense of the word) are in the discretion of the Judge. This discretion, however, is not to be exercised arbitrarily; and although the Master, or Judge, or the Court (as the case may be), is not governed by precedents so much as by what the justice of each particular case requires, nevertheless it may be taken that where there are no reasons to the contrary, the costs incurred by any particular litigation must be borne by the unsuccessful party. This rule was expressly laid down in *Ex parte Sichell* (*n*),

(*i*) *Ante*, p. 1244. See, further, *Empire Assur. Corporation*, 2 W. N. 139, where the V.-C. Stuart strongly objected to making a company pay the costs of more than one petition, and dismissed, with costs, a petition presented unnecessarily after another which had been advertised.

(*k*) In *Ex parte Hardinge*, 1 New R. 40, it was held that the official manager of the Plumstead Water-

works Company was not entitled to his costs out of the assets of the company, those costs having been incurred under an order made by a court having no jurisdiction.

(*l*) See Rule 60.

(*m*) See § 167.

(*n*) 1 Sim. N. S. 187. See, also, *Barry's case*, 2 Dr. & Sm. 321; *Oakes' case*, and *Peek's case*, L. R. 3 Eq. 633, 634.

and it has been held to apply to appeals (*o*). The rule, moreover, applies as well in favour of as against the company, and not only in cases of litigation between the company and its contributories, but also in those between it and non-contributories, or between different classes of contributories disagreeing amongst themselves. For example, if a contributory applies unsuccessfully to be removed from the list (*p*), or unsuccessfully resists being put on it (*q*), or applies unsuccessfully to have another person put on (*r*), or appeals unsuccessfully against an order making, or refusing to make, a call (*s*), or if he moves unsuccessfully to discharge the winding-up order (*t*), or to disturb a compromise made with other contributories (*u*), or if a person claiming to be a creditor appeals against a disallowance of his debt, and he fails on the appeal (*x*); in all these and similar cases the motion or the appeal will, as a rule, be dismissed with costs.

So where the official liquidator, on the part of the company, unsuccessfully appeals against an order excluding a person from the list of contributories (*y*), or unsuccessfully resists an appeal by a person put on the list, and seeking to have his name removed from it (*z*), or an appeal against an order for a

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(*o*) *Ex parte Hall*, 1 De G. Mac. & G. 1.

(*p*) Examples of this are very numerous. See, amongst others, *Oakes' case*, and *Peek's case*, L. R. 3 Eq. 633, 634; *Sichell's case*, 1 Sim. N. S. 187; *Reaveley's case*, 1 De G. & S. 550; *Bernard's case*, 5 ib. 283; and as to appeals, *Mansfield's case*, 2 Mac. & G. 57; *Lawes's case*, 1 De G. Mac. & G. 421; *Straffon's Executors' case*, ib. 576; *Gibson's case*, 2 De G. & J. 275.

(*q*) *Barry's representatives' case*, 2 Dr. & Sm. 321.

(*r*) *Bugg's case*, 2 Dr. & Sm. 452.

(*s*) *Ex parte Cropper*, 1 De G. Mac. & G. 147; *Ex parte Chippendale*, 4 ib. 19; *Londesborough's case*, ib. 411; *Ex parte Woolmer*, 2 ib. 665.

(*t*) *Ex parte Woolmer*, 5 De G. &

S. 117, and 2 De G. Mac. & G. 665; *Clarke's case*, 1 K. & J. 22.

(*u*) *Lucy's case*, 4 De G. Mac. & G. 356.

(*x*) *Ex parte Lloyd*, 1 Sim. N. S. 248; *Wryghte's case*, 2 De G. Mac. & G. 636.

(*y*) As in *Maudslay's case*, 17 Sim. 157; *Capper's case*, 1 Sim. N. S. 178; *Conway's case*, 5 De G. & S. 150; *Holme's case*, 4 ib. 312; and 2 De G. Mac. & G. 113; *Ex parte Beardshaw*, 1 Drew. 226; *Ex parte Roberts*, ib. 204; *Brockwell's case*, 4 ib. 205; *Nicol's case*, 3 De G. & J. 387.

(*z*) As in *Robert's case*, 3 De G. & S. 205, and 2 Mac. & G. 192; *Mathew's case*, 3 De G. & S. 234; *Mainwaring's case*, 2 De G. Mac. & G. 66.

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call (*a*), or an appeal against the disallowance of a creditor's demand (*b*), or an appeal against an order excluding a contributory from attendance before the Judge acting in the winding up (*c*), or an appeal against an order for the delivery up of documents (*d*); in these and all similar cases the company, as a rule, pays the costs (*e*).

Representative
cases.

However, where the case of one individual is selected to represent that of a class, the general rule is not to make him pay the costs even if he fails; and frequently the company is ordered to pay them (*f*).

No order as to
costs.

But although the general rule is as above stated, its application is far from being universal. It frequently happens, that no order whatever is made as to costs, except that those of the official liquidator are to be borne by the company. It is very difficult to lay down any general rules which can be relied upon as guides, in cases where so much is left to the discretion of the Judge; all that can be said is that there are cases in which a person has not been made to pay costs, where he has unsuccessfully resisted being made a contributory under circumstances of considerable hardship (*g*); where he has been induced to take shares by misrepresentation or fraud (*h*); where the law applicable to his case has been doubtful (*i*); where he has been made a contributory on the authority of a recent decision, followed with reluctance (*k*); where the Judge acting in the

(*a*) As in *Upfill's case*, 1 Sim. N. S. 235; *Hunter's case*, ib. 435; *Mowatt and Elliott's case*, 3 De G. Mac. & G. 254.

(*b*) *Croxton's case*, 5 De G. & S. 432.

(*c*) *Ex parte Slatter's executors*, 5 De G. & S. 34.

(*d*) *Pell's case*, 3 De G. & S. 170.

(*e*) In *National Savings Bank Association*, L. R. 1 Ch. App. 554, the respondent had his costs from the company, but the Court declined to make any order as to the costs of the company unsuccessfully appealing.

(*f*) See *Walker's case*, L. R. 2 Eq. 554. But see *contra*, *Ex parte Walton*, and *Ex parte Hue*, 3 Jur.

N. S. 853.

(*g*) As in *Crosfield's case*, 4 De G. & S. 338, and 2 De G. Mac. & G. 128; *Chartres' case*, 1 De G. & S. 581; *Richmond's Executors' case*, 3 ib. 96; but see *Oakes' case*, and *Peek's case*, L. R. 3 Eq. 633, 634.

(*h*) *Dodgson's case*, 3 De G. & S. 85; *Parbury's case*, ib. 43. But see *Hitchcock's case*, ib. 92, and *Gibson's case*, 2 De G. & J. 275; and *Oakes' case*, and *Peek's case*, L. R. 3 Eq. 633, 634.

(*i*) As in *Angas's case*, 1 De G. & S. 560; *Kluht's case*, 3 ib. 210.

(*k*) As in *Hole's case*, 3 De G. & S. 241; *Ex parte Brittain*, 1 Sim. N. S. 281. But see *Sichell's case*,

winding up has at different times taken different views of a contributory's liability (*l*), or has decided in favour of the contributory (*m*); where a director has succeeded in getting himself struck off the list on which he would not have been put, had it not been for his own ambiguous conduct (*n*); in other hard or doubtful cases, and where one side has been as much in fault as the other (*o*).

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All costs properly incurred by the official liquidator, are defrayed out of the assets of the company, and if necessary by calls on its contributories (*p*). Even where the official liquidator is a party to some suit or proceeding, the costs of which he is ordered to pay personally, his right to be indemnified by the company is not necessarily taken away by such order (*q*). But there can be no doubt of the power of the Court to order an official liquidator to pay out of his own pocket, and without recourse to the company, any costs, charges, or expenses improperly incurred by him in winding up the company (*r*); and on more than one occasion, the official liquidator has been made to bear his own costs (*s*). It has, however, been said that the official liquidator cannot be ordered personally to pay the costs incurred by his having improperly summoned a person as a contributory (*t*). In those cases in which no costs are given, or in which the costs of the official liquidator are not otherwise provided for, his costs are borne by the company, unless the contrary is ordered.

Payment of costs
by official liquidator.

A creditor's representative appointed under the Winding-up

ib. 187, and *Markwell's case*, 5 De G. & S. 528.

(*l*) As in *Stanhope's case*, 3 De G. & S. 198.

(*m*) As in *Bird's case*, 1 Sim. N. S. 47; *Holt's case*, ib. 389; *Keene's Executors' case*, 3 De G. Mac. & G. 272; *Woollaston's case*, 5 Jur. N. S. 617, and 4 De G. & J. 437.

(*n*) As in *Cockburn's case*, 4 De G. & S. 177; *Sharp and James' case*, 1 De G. Mac. & G. 565.

(*o*) See *Worcester Corn Exchange Co.*, 3 De G. Mac. & G. 189; *Talbot's case*, 5 De G. & S. 386; *Preece*

and *Evans' case*, 2 De G. Mac. & G. 374.

(*p*) As to calls for remuneration for work to be done, see *The Marylebone Bank*, 18 Jur. 281.

(*q*) *Grand Trunk Rail. Co. v. Brodie*, 3 De G. Mac. & G. 146.

(*r*) See *Ex parte Roberts*, 1 Drew. 215.

(*s*) *Clifton's case*, 5 De G. Mac. & G. 743; *Ex parte A'Beckett*, 2 Jur. N. S. 684, where the O. M. had not kept proper books.

(*t*) *Ex parte Marsh*, 1 Mac. & G. 302.

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Costs of creditors' representatives.

Amendment Act of 1857, was held entitled to his reasonable costs in the matter of the winding up of the company; and such costs were borne by the company. The creditor's representative was held entitled to attend the settlement of the list of contributories (*u*), and to have his costs out of the estate of the company on appearance on an appeal upon the question whether a person is or not a contributory (*x*).

Although there was no necessity for the appearance of the creditor's representative, simply to support the same case as the official manager, the usual course was to give the former his costs. This practice, however, was very justly disapproved more than once (*y*). The office of creditor's representative is now abolished, but the Court has power to appoint persons to represent either creditors or contributories (*z*), and the costs of such persons are usually paid by the company even when there is no adverse interest between them and the official liquidator (*a*). But other individuals who choose to appear upon questions not directly concerning them, must do so at their own expense (*b*).

Secondly, as to the payment of the costs payable by the company.

Calls for costs.

The costs which have to be borne by the company, or are payable out of its estate, are discharged by the official liquidator out of the assets of the company in his hands, if he has sufficient for the purpose, and if not, then by calls on some or all of the contributories of the company (*c*).

(*u*) *Mexican and South American Mining Co.*, 26 Beav. 172.

(*x*) See *Budd's case*, 10 W. R. 51, L. J.; *Hatton's case*, ib. 313, V.-C. W.; *Ex parte Finlay & Co.*, 27 L. J. Ch. 658.

(*y*) See *per* V.-C. Wood, in *Hatton's case*, 10 W. R. 313; *Hoare's case*, ib. 381; and *Re The Saxon Life Assurance Society*, 2 J. & H. 408. In *Burges and Stock's case*, 2 J. & H. 441, where the creditors' representative appeared on the

hearing of a claim by a person seeking to establish a debt against the company, the court declined to hear counsel for the creditors' representative, and gave him the costs of a simple appearance only.

(*z*) Rule 61.

(*a*) See *Oakes' case* and *Peek's case*, L. R. 3 Eq. 634.

(*b*) *Ib.*

(*c*) See, as to calls for costs, *The Companies act*, 1862, §§ 38, 102.

In the event of the assets being insufficient to satisfy the liabilities, the Court may make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding it up, in such order of priority as the Court thinks just (*d*).

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A call for costs may, if necessary, be made before all the assets are got in (*e*), and before the exact amount of the costs payable has been ascertained by taxation (*f*), and a call for costs is *prima facie* payable, by those liable to it, in proportion to the number of shares held by them respectively (*g*).

The right to have a call made for payment of costs may be lost by laches (*h*).

But a call for costs, like a call for debts, is only to be made on those liable to pay it (*i*). Therefore, where in winding up an abortive company, costs had been incurred, for which a call was made on all the contributories, before their liabilities to the debts of the company had been ascertained, it was held that this call was wrongly made (*k*). It is, therefore, the duty of the judge in the winding up, to ascertain to what costs each contributory or set of contributories is liable, and to make the call for their liquidation accordingly. It is, however, to be observed, that where costs have been incurred in proceedings taken for the benefit of all the contributories as a body, they are all rateably chargeable with the costs of those proceedings, although they may have been taken unsuccessfully, and although some of the contributories may have already paid more than others towards the discharge of the company's debts (*l*). Any temporary injustice resulting from this last circumstance must be set right afterwards (*m*).

On whom call
to be made.

(*d*) *Ib.* § 102.

(*e*) *Gay's case*, 1 De G. Mac. & G. 347, and 5 De G. & S. 122. See *ante*, p. 1394.

(*f*) *Dale's case*, 1 De. G. Mac. & G. 513; *Ex parte Woolmer*, 2 ib. 665. Compare *Marylebone Bank*, 18 Jur. 281.

(*g*) *Ex parte Woolmer*, 2 De G. Mac. & G. 665.

(*h*) See *Ex parte A'Beckett*, 2 Jur. N. S. 684.

(*i*) *Hunter's case*, 1 Sim. N. S. 435.

(*k*) *Ib.* See, too, *Gay's case*, 5 De G. & S. 122; *Marylebone Bank*, 18 Jur. 281.

(*l*) *Preece and Evans' case*, 2 De G. Mac. & G. 374; *Ex parte Woolmer*, ib. 665; *Gay's case*, 5 De G. & S. 122, and 1 De G. Mac. & G. 347.

(*m*) *Ib.*

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SECTION XIII.—DISTRIBUTION OF SURPLUS ASSETS AND FINAL
DISSOLUTION OF THE COMPANY.

After the debts, liabilities, and losses of the company have been paid, discharged, and made good, and the cross claims between the contributories have been settled, and the costs of winding up defrayed or provided for, there remains but to distribute the surplus assets of the company, if any there be (*n*). The cases in which any surplus is left are unfortunately very rare, but the possibility of there being a surplus, shows that a person *may* be prejudiced by being excluded from the list of contributories, although, in point of fact, those who are so excluded seldom have reason to complain. A person, however, upon whom calls can be made, will not be allowed to remain on the list so long as he thinks it will be for his benefit to continue there, and then insist on his name being removed when he begins to apprehend that it will be to his prejudice (*o*).

It has already been seen, that holders of paid-up shares in limited companies are entitled to be placed on the list of contributories in order to obtain their share of the surplus assets, if any (*p*).

Termination of
winding up.

Upon the termination of the proceedings in chambers for the winding up of a company, the official liquidator is required to bring in a balance sheet and pass his final account (*q*). Upon payment, as he may be directed, of the balance, if any, in his hands, the recognisance of himself and his sureties may be vacated (*r*), and a certificate that the affairs of the company have been completely wound up, is to be made by the chief clerk (*s*).

Order dissolving
company.

When the affairs of the company have been completely wound up, the Court is required to make an order (*t*) dissolving

(*n*) Companies act, 1862, § 109.

(*o*) See *Underwood's case*, 5 De G. Mac. & G. 700, *per* Turner, L. J.

(*p*) *Ante*, p. 1302.

(*q*) Rule 65.

(*r*) Rule 65.

(*s*) Rule 66, and see the form in schedule 3, No. 55.

(*t*) See the form in the 3rd schedule to the rules, No. 56.

the company as from the date of the order (*u*); and notice of this order is forthwith to be given by the official liquidator to the registrar of joint-stock companies, who is required to make a minute in his books of the company's dissolution (*x*). Bk. IV. Chap. 3.
Div. 1. Sect. 13.

The order dissolves the company (*y*).

The books of the company are to be disposed of as the Court may direct (*z*). The documents relating to the winding up, and the book containing the official liquidator's account are to be deposited in the Record and Writ Clerks' Office (*a*). Books of com-
pany.

DIVISION II.—OF WINDING UP VOLUNTARILY AND SUBJECT TO THE SUPERVISION OF THE COURT.

1. *Differences between the various methods of winding up.*

When a company is wound up by the Court, everything is done under the immediate superintendence of the chief clerk of the judge to whose court the winding up is attached. This necessarily involves the issuing of summonses and obtaining of appointments, and consequent delay and expense, even in matters of routine. In addition to this, the power of adjourning every question before the judge is frequently exercised for the mere purpose of gaining time; and every such adjournment, whether reasonable or not, increases the delay and expense of winding up. Inconveniences
of compulsory
winding up.

To avoid these inconveniences as far as practicable, the Companies act, 1862 (following in this respect the acts of 1856—58) provides for two other methods of winding up, viz., 1st, purely voluntarily, that is, without the intervention of the Court at all, and, 2dly, voluntarily, but at the same time under an order and subject to the supervision of the Court. Winding up
voluntarily and
subject to super-
vision.

The practical differences between these two methods on the one hand, and winding up by the Court on the other, are, that when a company is wound up voluntarily, or subject to the Differences be-
tween these and
compulsory
winding up.

(*u*) § 111, and see rule 66.

(*x*) §§ 112 and 113.

(*y*) § 111.

(*z*) § 155. As to the jurisdiction

of the Court over dissolved companies, see *Crookhaven Mining Co.*, L. R. 3 Eq. 69, and *infra*, 1419.

(*a*) Rule 67.

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supervision of the Court, all the business is done by the liquidator, without consulting the judge or his chief clerk, who are only appealed to on matters of difficulty or for the purpose of exercising powers which the liquidator does not possess (*b*). This at once saves much delay and expense. On the other hand, the liquidator being able to act without the direction of the judge or his chief clerk, is more likely to take steps which have afterwards to be rectified, perhaps by litigation (*c*). Moreover, notwithstanding the power of invoking the aid of the Court, creditors and contributories complain that, practically, they have not the same facilities for ascertaining what is being done by the liquidator under a voluntary winding up, or winding up subject to supervision, as they have when a company is wound up compulsorily.

Difference between winding up voluntarily and subject to supervision.

The theoretical difference between winding up voluntarily and winding up subject to supervision appears to be that the first is supposed to be carried on without any aid from the Court, except when that aid is invoked for some special and limited purpose; whilst when a company is wound up subject to supervision, the extent to which the winding up shall be carried on without consulting the judge or his chief clerk depends upon the judge (*d*). The judge, however, imposes no restrictions, unless some necessity for so doing is shown to exist (*e*); and consequently the practical difference between the two methods of winding up consists mainly, if not entirely, in the comparative facilities for obtaining the assistance of the Court, and in the comparative ease with which the liquidator can be controlled, and executions against the company be prevented.

2. *Of winding up voluntarily.*

Companies capable of being wound up voluntarily.

All companies registered under the Companies act, 1862, and also all companies which, though not so registered, have been registered under the acts of 1856—1858 (*f*), and also all

(*b*) See the judgment of V.-C. Wood, in the *Inns of Court Hotel Co.*, 1 W. N. 348.

(*c*) See the observations of L. J. Turner, as to the expense of voluntary liquidations in *National*

Savings Bank Association, L. R. 1 Ch. App. 553.

(*d*) See § 147.

(*e*) See the form of order in schedule 3 to the rules, No. 4.

(*f*) *Torquay Bath Co.*, 32 Beav.

industrial and provident societies registered under 25 & 26 Vict. c. 87, may be wound up voluntarily (*g*). But no other company can (*h*). But although unregistered companies cannot be wound up voluntarily under the act, there is, theoretically, nothing to prevent the members of such companies, if unincorporated, from dissolving the partnership which subsists between them, and from applying their joint assets in discharging their joint liabilities, and dividing the surplus amongst themselves. It is seldom, however, that this can be done; for the successful carrying out of such a scheme is liable to be defeated not only by disagreement amongst the shareholders, but also by the importunity of creditors. Practically, therefore, and excepting a few rare cases, unregistered companies must be wound up by the Court.

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A company capable of being wound up voluntarily under the act may be so wound up,—

Circumstances under which a company may be wound up voluntarily.

1. When the time, if any, fixed by the articles for the duration or dissolution of the company has expired or arrived, and the members have passed a resolution requiring the company to be wound up voluntarily (*i*).

2. When the members have passed a special resolution requiring the company to be so wound up (*k*).

3. When the members have passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind it up (*l*).

The resolution in this last case must be passed in the manner required for a special resolution, but no confirmation of it is necessary (*m*).

The resolution must, in the second and third of the above cases, be advertised in the *Gazette* (*n*).

With respect to extraordinary resolutions, the following case is important:—In the case of the *Bridport Old Brewery Com-*

Extraordinary resolution.

581; *London India Rubber Co., L.*
R. 1 Ch. App. 329.

(*g*) See §§ 129, 176, 177, and 196,
and, as to the last-mentioned so-
cieties, *infra*.

(*h*) § 200, cl. 2.

(*i*) §§ 129 and 130.

(*k*) § 129.

(*l*) *Ib.*

(*m*) *Ib.* and § 51.

(*n*) § 132.

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pany (o), notice was given that an extraordinary meeting would be held to consider, and, if so determined, to pass, a resolution to wind up the company voluntarily. The meeting passed a resolution that it had been proved that the company could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the company. This resolution was never confirmed, and could not, therefore, be supported as a special resolution. It was held that it could not be supported as an extraordinary resolution, inasmuch as the notice was so framed as to lead to the supposition that a special resolution, requiring confirmation, was to be proposed, and did not sufficiently disclose an intention to proceed by way of extraordinary resolution.

Effect of resolution to wind up.

The effect of a valid resolution to wind up voluntarily, when a compulsory winding-up order is sought to be obtained, has been considered already (p). It is only necessary here to add that, although a company may be in course of winding up voluntarily, any creditor who can satisfy the Court that his rights are prejudiced, is entitled to have the company wound up by the Court (q); but the Court may adopt all or any of the proceedings taken in the course of the voluntary winding up (r).

Commencement of winding up.

The time at which the resolution to wind up is passed is the time at which the winding up is deemed to commence (s), and from that time the company must cease to carry on business, except for the purpose of winding up its affairs (t). The company, however, retains its corporate character until its affairs are wound up, and it has been actually dissolved, as mentioned below (u). After the passing of the resolution to wind up, no shares can be lawfully transferred, except to or with the sanction of the liquidators (x); nor can the property of the company be dealt with without their sanction (y).

(o) L. R. 2 Ch. App. 191. See, p. 1420—1.
also, *National Savings Bank Assoc.*, (q) § 145.
L. R. 1 Ch. App. 553; *Inns of Court Co.*, 1 W. N. 348. (r) § 146.
(s) § 130. See *ante*, p. 1250.
(t) § 131.
(u) *Ib.*, and § 143.
(x) § 131. See *ante*, p. 1356, *et seq.*
(y) See §§ 131, 133, and *ante*, p. 1521.

The first thing to be done after a resolution to wind up is passed is to appoint one or more liquidators, for the purpose of carrying the resolution into effect (*z*). The appointment lies with the members (*a*); but they are empowered to delegate the appointment to the creditors of the company, or to a committee of them (*b*). If there is no liquidator, the Court may appoint one or more, on the application of a contributory (*c*). The Court, moreover, may, on due cause shown, remove any liquidator and appoint another (*d*).

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Liquidators.

In the appointment of liquidators some care is required; for it has been held that they cannot be appointed at a meeting unless notice has been given that their appointment will be proposed at such meeting (*e*). Whether acts done by liquidators improperly appointed are null and void, or whether they are valid notwithstanding the defect in their appointment, is not so clear as might be desired. It seems, however, that when their appointment is proved to have been invalid, acts done by them are void (*f*). But it is conceived that it is by no means every irregularity in the appointment which would vitiate it: in many cases the maxim, *feri non debuit, sed factum valet*, would apply (*g*).

Resolutions appointing liquidators.

Upon the appointment of liquidators, the powers of the directors cease, except so far as their continuance may be sanctioned by the members in general meeting, or by the liquidators (*h*).

The duties of the liquidators are—

1. To apply the property of the company in satisfaction of its liabilities, *pari passu* (*i*);

Duties of liquidators.

(*z*) § 133, cl. 2, 4, 6.

(*a*) § 133, cl. 3, and § 140.

(*b*) § 135.

(*c*) § 141.

(*d*) *Ib.* *United Merthyr Collieries Co.*, 2 Weekly N. 99.

(*e*) *Stearic Acid Co.*, 9 Jur. N. S. 1066; *Inns of Court Hotel Co.*, 1 Weekly N. 348; *Anglo-Californian Co. v. Lewis*, 6 H. & N. 174. In that case the invalidity of the appointment of the liquidators enabled a

shareholder to defeat an action for calls made by them. See, also, the case of the *Bridport Old Brewery Co.*, L. R. 2 Ch. App. 191, *ante*, pp. 1411—2.

(*f*) See the last two cases, and § 67 of the act. In the case of the *Bridport Old Brewery Co.*, the effect of that section was discussed.

(*g*) See *ante*, p. 807, *et seq.*

(*h*) § 133, cl. 5.

(*i*) § 133, cl. 1.

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2. To pay the debts of the company, and adjust the rights of the contributories amongst themselves (*k*);

3. To pay the costs of winding up (*l*);

4. As soon as the affairs of the company are fully wound up, to make up an account showing the manner in which such winding up has been conducted (*m*);

5. To call a meeting of the company (*n*) for the purpose of having this account laid before them, and hearing any explanation that may be given by the liquidators (*o*);

6. To make a return to the registrar of joint stock companies of such meeting having been held (*p*).

If the winding up continues more than a year, the liquidators must, at the end of the first and each succeeding year, summon a general meeting of the company (*n*), and lay before such meeting an account showing their acts and dealings, and the manner in which the winding up has been conducted during the preceding year (*q*).

In order to enable the liquidators to perform their duties, they are authorised—

1. To exercise all powers given by the act to the official liquidator (*r*);

2. To exercise the powers given to the Court of settling the list of contributories (*s*);

3. To make calls upon all or any of the contributories settled on the list to the extent of their liability (*t*).

4. To apply to the Court to determine any question arising in the winding up, or to exercise any of the powers which the Court might exercise if the company were being wound up by it (*u*).

5. To summon general meetings of the company (*x*).

(*k*) § 133, cl. 10.

(*l*) *Ib.* cl. 9, and § 144.

(*m*) § 142.

(*n*) *Qu.* members or the contributories?

(*o*) § 142.

(*p*) § 143.

(*q*) § 139.

(*r*) § 133, cl. 7. See *ante*, p. 1275. It is apprehended that the voluntary liquidators can, without

the sanction of the Court, do any of those things which the official liquidator can do under § 95, with the sanction of the Court.

(*s*) § 133, cl. 8. See *infra*, p. 1418.

(*t*) § 133, cl. 9. See *infra*, p. 1418.

(*u*) § 138, and rule 51. This enables the Court to do in a voluntary winding up whatever it can do in a compulsory winding up.

(*x*) § 139.

The liquidators are also empowered, with the sanction of an extraordinary resolution of the company, to make arrangements with creditors and contributories, and to compromise all claims by or against the company (*y*); and with the sanction of a special resolution to sell the business of the company, in consideration of shares, policies, or other like interests, for the purpose of distribution amongst the members (*z*).

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Lastly, the liquidators are empowered, with the sanction of the Court, to prosecute delinquent directors, managers, officers, or members of the company (*a*).

Where there are more liquidators than one, the powers given to them by the act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two (*b*). There is no necessity, however, to appoint more than one (*c*).

Where there are more than one.

The exercise by the liquidators of the foregoing powers is subject to be controlled by the company and its creditors; for the company is empowered by an extraordinary resolution to enter into any arrangement, with three-fourths in number and value of its creditors, with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised (*d*). And any arrangement so made is binding as well on the contributories as on the creditors, if not appealed against within three weeks from the date of its completion (*e*). Moreover, any contributory may apply to the Court to determine any question arising in the winding up (*f*).

Control of members and creditors over liquidators.

With respect to the sale of the assets of the company, the liquidators apparently have power to sell them for money as best they can; at the same time, if any particular sale is

Sale of assets.

(*y*) §§ 159 and 160. See *ante*, p. 1276, as to compromises.

(*z*) § 161. See *infra*, as to this.

(*a*) § 168. To obtain this sanction a petition must be presented. See rule 51.

(*b*) § 133, cl. 6.

(*c*) § 133, cl. 4.

(*d*) §§ 135 and 136.

(*e*) § 137. The appeal may be by petition or motion. See rule 51.

(*f*) § 138, by motion or petition, see rule 51. See for examples, *Anglesea Colliery Co.*, L. R. 2 Eq. 380; *Crookhaven Mining Co.*, L. R. 3 Eq. 69. See, also, *London Bank of Scotland*, 2 W. N. 114, as to inspecting documents, &c.

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Transfer of business to another company.

opposed by any of the creditors or contributories, it may be prudent to apply to the Court to sanction it (*g*).

One of the most important powers of the liquidators under a voluntary winding up, is that of selling the business and goodwill of the company being wound up to another company, in consideration of shares, policies, or other like interests in the purchasing company. This power is conferred by §§ 161 and 162 of the Companies act, 1862 (*h*), from which it will be seen—

1. That the power can only be exercised under the authority of a special resolution of the company (*i*) being wound up ;

2. That if so sanctioned, the transfer can be made notwithstanding the opposition of the minority ;

3. That any dissentient can require the liquidators, at their option, to abstain from carrying the resolution into effect, or to purchase the interest of the dissentient ;

4. That this requisition must be made by leaving a notice in writing, addressed to the liquidators, and left at the registered office of the company not later than seven days after the passing of the resolution ;

5. That in the event of the liquidators electing to purchase the interest of a dissentient, the price, if not agreed upon, must be ascertained by arbitration, as provided by 8 & 9 Vict. c. 16, §§ 128—134 (*k*).

Rights of dissentients.

With respect to the position of those who dissent from such a transfer, but who do not give the proper notice in due time, it has been decided that, although they cannot impeach the transfer, they cannot be compelled to become shareholders in the purchasing company ; and if they are registered as share-

(*g*) This was done in the *Scinde, &c., Bank Corporation*, 2 Weekly N. 41, and the agreement for sale was confirmed. As to compelling the liquidators to accept the best of two offers, see *The Colonial and Gen. Gas Co.*, ib. 42, where, however, the company was being wound up subject to supervision.

(*h*) For instances in which the Court has sanctioned such a trans-

fer, where the company was being wound up, subject to supervision, see *Agra and Masterman's Bank*, 1 W. N. 400. See *ante*, p. 1277.

(*i*) *Qu.* members or contributories ?

(*k*) The judge can appoint an umpire, if the arbitrators do not agree. See *Re Lord*, 24 L. J. Ch. 145 : *Re Anglo-Italian Bank*, 2 W. N. 151.

holders therein against their consent, they are entitled to have their names removed from the register (*l*). Moreover, although in the absence of a proper and timely notice a dissentient loses his right to have his interest purchased, there is nothing in the act to deprive him of his share of the surplus assets of the company being wound up. Practically, this share is represented by the shares in the purchasing company, which he might take if he chose; and it would seem, therefore, that he is entitled to require the liquidators to sell these for his benefit, and to pay the proceeds over to him (*m*). This, however, has not yet been decided.

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In a case where the business of a bank had been transferred in the way above mentioned, and dissentient shareholders impeached the validity of the resolution to wind up, and of all the subsequent transactions, the Court gave them leave to take such proceedings as they might be advised in the name of the company, in order to set aside the transactions complained of; but the Court declined to order the bank to be wound up compulsorily, or subject to the supervision of the Court, and also declined to decide what the rights of the dissentients were (*n*).

Imperial Bank
of China, India,
and Japan.

A purely voluntary winding up does not, *per se*, prevent a creditor of the company from suing it, or issuing execution against it; it is not therefore, in any case, necessary for him to apply for leave so to do (*o*). But the Court has jurisdiction to restrain him as well from issuing execution as from suing (*p*); and instances have occurred in which such jurisdiction has been exercised (*q*).

Staying ac-
tions, &c.

The debts to be paid out of the assets of the company are the same as those which would have to be paid under a compulsory winding up (*r*). But in order to exclude creditors who do not prove within a given time, such time must apparently

Payment of
debts.

(*l*) *Higg's case*, 2 Hem. & M. 657; *Martin's case*, ib. 669; *Los' case*, 11 Jur. N. S. 661.

(*m*) The marginal note in *Higg's case*, 2 Hem. & M. 657, is opposed to the statement above, but that note goes too far, and is scarcely warranted by the judgment.

(*n*) *Imperial Bank of China, &c.*, L. R. 2 Ch. App. 339.

(*o*) See §§ 85, 87, and 163, which only apply to winding up by the Court, or subject to its supervision.

(*p*) § 138.

(*q*) *Ante*, p. 1256.

(*r*) See *ante*, p. 1279.

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The list of contributories.

Calls.

be fixed by the Court, the fixing of such time not being one of those things which liquidators alone can do (s). The rules as to set-off are the same as in a compulsory winding up (t).

The contributories in a voluntary winding up are those persons who would be contributories on a compulsory winding up having the same date for its commencement. The liquidators settle the list, and they have all the powers of the Court for this purpose (u). But whether under these words the liquidators have power to rectify the register of members may well be doubted (x). The liquidators, however, have power to sanction transfers of shares and alterations in the status of members made after the commencement of the winding up (y). In exercising this power regard ought to be had to the principles acted upon by the Court in like cases (z).

The liquidators are also empowered to make calls on the contributories (a); and they have the same discretion both as to when to make a call, and as to its amount, as the Court has under a compulsory winding up (b). The liquidators, however, have no power to enforce payment without judicial assistance. The methods of enforcing payment are either by an action at law in the name of the company (c); or, if the contributory is already settled on the list, by an application to the Court of Chancery to order payment under the powers conferred upon it by the Companies act, 1862 (d). In the event of death or bankruptcy payment can be obtained wholly or in part, as the case may be, by administering the estate of the deceased, or by proof against the bankrupt's estate. The same rules as to set-off against calls apply when a company is being wound up voluntarily as when it is being wound up compulsorily (e).

(s) See § 107.

(t) See §§ 38 and 101.

(u) § 133, cl. 8. As to giving notice of settling the list, see the *London Bank of Scotland*, 2 Weekly N. 114.

(x) Compare § 133, cl. 8, with §§ 38 and 95.

(y) See § 131.

(z) See *ante*, pp. 1356—63.

(a) § 133, cl. 7.

(b) Compare § 133, cl. 7, with § 202. See *ante*, p. 1394.

(c) See, for instances, *General Discount Co. v. Stokes*, 17 C. B. N. S. 765; *Hull Flax Co. v. Wellesley*, 6 H. & N. 38; *Garnett and Moseley Gold Mining Co. v. Sutton*, 3 B. & Sm. 321.

(d) See § 138.

(e) See *ante*, p. 1400.

The costs of winding up are payable out of the assets of the company in priority to all other claims (*f*); and the costs of the liquidators incurred in prosecuting delinquent directors, &c., are entitled to like priority (*g*).

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Costs.

In distributing the surplus assets care must be taken to put the contributories as far as practicable on an equality, regard being had to the amounts paid up on their respective shares (*h*).

Surplus assets.

A company which has been wound up voluntarily, is dissolved at the end of three months from the date of the registration of the return which the liquidators are required to make as before mentioned (*i*). Notwithstanding the dissolution of the company the Court has sufficient jurisdiction to make calls on the contributories for the payment of the debts of the company or the adjustment of the rights of the contributories, *inter se* (*k*). A company, moreover, will be restrained from dissolving without notice to those persons to whom it may in future become liable (*l*).

Dissolution of
company.

In connection with this subject it may be useful to refer to a case which arose under the acts of 1856-8. In *Lowndes v. Garnett and Moseley Gold Mining Company* (*m*), a creditor of a limited company which was being wound up voluntarily, filed a bill in Chancery to establish his claim against the company, and to restrain the company from parting with its assets and completing the voluntary winding up without paying him. The bill prayed that, if necessary, such winding up might be continued subject to the directions of the Court. This bill was met by a plea to the jurisdiction, and it was contended that under the acts of 1856-8 the Court of Bankruptcy was the only Court which had jurisdiction over the winding up of the company. The plea, however, was overruled, the juris-

Suit against
company to re-
strain dissolu-
tion.

*Lowndes v. Gar-
nett, &c., Gold
Mining Com-
pany.*

(*f*) § 144.

(*g*) § 168.

(*h*) See *Scinde, &c., Bank Corporation*, 2 W. N. 76, and *Anglesea Colliery Co.*, L. R. 2 Eq. 379; *Crookhaven Mining Co.*, L. R. 3 Eq. 69.

(*i*) § 143.

(*k*) See *Crookhaven Mining Co.*, L. R. 3 Eq. 69.

(*l*) See *Haytor Granite Co.*, L. R. 1 Ch. App. 77, a claim for rent, where the company being lessee had assigned.

(*m*) 2 J. & H. 282.

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Div. 2.

diction of the Court of Chancery in such a case clearly not being ousted.

3. *Of winding up subject to the supervision of the Court.*

Winding up subject to supervision of Court.

After a resolution has been passed for winding up a company voluntarily, the Court may make an order directing that the voluntary winding up shall continue, but subject to such supervision of the Court and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just (*n*).

The application for such an order is made by a petition (*o*), which must be advertised, verified, and served as required in the case of a petition for winding up by the Court (*p*). It must also be served on the liquidators if there are any (*q*).

In determining what ought to be done upon such a petition, the Court may consult the wishes of the creditors and contributories, and may summon meetings for the purpose of ascertaining their wishes.

Winding up subject to supervision preferred to compulsory winding up.

The circumstances which influence the Court in determining what order to make on petitions to wind up have been already noticed (*s*); and in addition to what has there been stated it is only necessary to observe that the Court is reluctant to interfere with a voluntary winding up, and will not at the instance of a contributory convert a voluntary winding up into a winding up subject to supervision unless there is misconduct on the part of the liquidators or some other good reason for so doing (*t*). Where there is no proper resolution to wind up voluntarily, the Court cannot make an order to wind up subject to supervision; for such an order presupposes, and, in fact, continues, a pre-existing voluntary winding up; and where there is no such winding up, all that the Court can do is to make a

(*n*) § 147. See the form of the order No. 4, in schedule 3 to the rules, and *ante*, p. 1410.

(*o*) § 148. See *infra*, p. 1422.

(*p*) Rules 1—5, *ante*, p. 1241.

(*q*) Rule 3. See *ante*, p. 1243.

(*r*) § 149, and see rules 45 and 46.

(*s*) *Ante*, pp. 1223—41.

(*t*) See *Imperial Bank of China, &c.*, L. R. 1 Ch. App. 339.

compulsory order (*u*), or to dismiss the petition, or to allow it to stand over in order to give the shareholders an opportunity of passing a resolution to wind up voluntarily (*x*). Where, however, the Court is satisfied that a proper resolution to wind up has been passed, it will make an order to continue the winding up subject to supervision in preference to a compulsory order, unless a compulsory order is desired by a majority of creditors or there is some other good reason for making it (*y*).

A strong illustration of this is afforded by the case of the *London and Mediterranean Bank* (*z*). That bank had been amalgamated with the *London and Bombay Bank*. A resolution to wind-up the London and Mediterranean Bank voluntarily was passed, and liquidators were appointed; a petition for an order to continue this winding up under the supervision of the Court, and to continue the voluntary liquidators, was afterwards presented by a contributory, and was supported by the company; but was opposed by another contributory, on the ground that a petition to wind-up the London and Bombay Bank was pending; and that petition disclosed facts tending to show that the continuance of the voluntary winding up by the voluntary liquidators was not for the interests of the contributories. The Court, nevertheless, made the order for continuing the voluntary winding up, subject to supervision (*a*). On a subsequent occasion another petition was presented by two creditors and a contributory in the London and Mediterranean Bank, praying for a compulsory winding-up order, on the ground that the voluntary winding up was not being conducted properly. The petition was supported by other creditors; but the Court, nevertheless, dismissed the petition (*b*), on the ground that a compulsory winding up order would not be more advantageous to the creditors, or contributories, than the order which already existed; and that if suffi-

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Div. 2.

London and
Mediterranean
Bank.

(*u*) As in the case of the *Bridport Old Brewery Co.*, L. R. 2 Ch. App. 191, noticed *ante*, p. 1111, and *The National Savings Bank Association*, L. R. 1 Ch. App. 547.

(*x*) See the cases collected, *ante*, p. 1235, *et seq.*

(*y*) See, in addition to the case next cited, *Inns of Court Hotel Co.*, 1 Weekly N. 348; *United Merthyr Collieries Co.*, 2 ib. 99.

(*z*) 1 Weekly N. 207 and 317.

(*a*) 1 Weekly N. 207.

(*b*) 1 Weekly N. 317.

Bk. IV. Chap. .
Div. 2.

Conflicting
winding-up
orders.

Effect of order
to wind up
subject to su-
pervision.

Commencement
of the winding-
up.

cient grounds were shown, the liquidators could be removed as easily under one order as the other.

In this case it was objected that a compulsory order could not be made until the former order for winding up, subject to supervision, had been discharged on a rehearing or on appeal: but this objection was overruled (*c*). Instances have also occurred in which proceedings, under a compulsory winding up order, have been stayed, and an order to wind up, subject to supervision, has been substituted for it (*d*). Where this is done, care ought to be taken not to disturb the date of the commencement of the winding up (*e*).

The general effect of an order to wind up, subject to supervision, is to continue the voluntary winding up with such restrictions, if any, as the Court may impose (*f*). The presentation of the petition gives the Court the same jurisdiction over actions and suits as a petition for winding up compulsorily (*g*), and has the same effect as such a petition on fraudulent conveyances by the company of its assets (*h*). Moreover, speaking generally, an order to wind up, subject to supervision, appears to be equivalent to an order to wind up compulsorily, except that the liquidators can, unless restricted by the Court, exercise, without its sanction, all the powers of liquidators acting in a winding up which is purely voluntary (*i*). The liquidators should, however, apply to the Court for its sanction before doing anything of unusual importance, or which is opposed on grounds not obviously unreasonable (*k*).

As observed on a former page, there is a doubt with respect to the time from which a winding up commences when a company is ordered to be wound up, subject to supervision (*l*). It appears, indeed, to be plain that where a resolution to wind up

(*c*) 1 Weekly N. 317.

(*d*) This was done by the Master of the Rolls in the case of the *General Exchange Bank*, May 1867. The application was made by summons, not by petition. See *ante*, p. 1241.

(*e*) See as to this, *ante*, p. 1250, and *infra*.

(*f*) § 147, and see the form of

the order No. 4, in the 3rd schedule to the rules.

(*g*) See §§ 148 and 85, *ante*, p. 1255.

(*h*) § 164. See *ante*, pp. 1251-52.

(*i*) § 151.

(*k*) As to transferring the business of the company, see *ante*, pp. 1415-17.

(*l*) *Ante*, p. 1250.

voluntarily precedes the presentation of the petition, the commencement dates from the resolution (*m*). But it frequently happens—1, that a petition to wind up compulsorily is presented; 2, that a resolution to wind up voluntarily is passed before the petition is disposed of; and 3, that an order is afterwards made, upon that same petition, to continue such voluntary winding up, subject to the supervision of the Court. In such cases it would be advantageous to hold that the commencement of the winding up should date from the presentation of the petition, rather than from the passing of the resolution; but it is doubtful whether this can be done consistently with the provisions of the statute (*n*).

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Div. 2.

If an order is made for winding up, subject to the supervision of the Court, the Court may appoint one or more liquidators, in addition to those previously appointed (*o*). The additional liquidators have the same powers, are subject to the same obligations, and stand in the same position as if they had been appointed by the company (*p*). This power of appointing additional liquidators is very frequently exercised for the protection of creditors (*q*). An appointment of an additional liquidator chosen by the creditors, practically secures to them the same protection as the appointment of an official liquidator under an order to wind up compulsorily; and by appointing such additional liquidator the necessity of making a compulsory winding up order is frequently obviated. Not only can the Court appoint additional liquidators to act with those appointed by the contributories, but it can also remove any liquidator whom they have appointed (*r*). This power, however, can only be exercised on due cause shown; and to induce the Court to exercise it, misconduct on the part of the liquidators must be proved (*s*).

Liquidators.

(*m*) See § 130.

(*n*) The question turns on the true construction of § 151, taken in conjunction with §§ 84, 130, 148, and 164.

(*o*) § 150.

(*p*) § 150. The liquidators appointed by the Court are subject to removal for due cause. See §§ 150

and 141.

(*q*) See an instance under the acts of 1856-58. *Llanfyrnach Silver Lead Mining Co.*, 9 W. R. 500.

(*r*) § 141. *United Merthyr Collieries Co.*, 2 Weekly N. 99.

(*s*) *London and Mediterranean Bank*, 1 Weekly N. 317, *ante*, p. 1421; *United Merthyr Collieries Co.*, 2 *ib.*

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Superseding
order.

If an order for winding up, subject to the supervision of the Court, is superseded by an order for winding up by the Court, the old liquidators, or any of them, may be appointed official liquidators, either with or without other persons, and either provisionally or permanently (t).

99. In the last case liberty to this does not seem to be necessary.
apply to remove was reserved, but (t) § 152.

APPENDIX.

No. I.

FOREIGN COMPANIES.

It is an established rule of private international law that a corporation duly created according to the laws of one state may sue and be sued in its corporate name in the courts of other states (a). This rule was recognised by our own courts in the case of *The Dutch West India Company v. Moses* (b), and since that decision there have been several instances of actions and suits instituted both by and against foreign incorporated companies (c).

A foreign corporation, moreover, may sue here by the name it has acquired by reputation (d).

But a corporation created by a government, not recognised by her Majesty, cannot be recognised as a corporation by the courts of this country (e).

The same considerations of convenience, which induce the courts of one country to recognise the existence of corporate bodies created in other countries, would probably induce the recognition of a privilege of suing and being sued by a public officer, which is frequently granted to companies not actually incorporated (f).

It has been decided that where a company formed in a colony is empowered by an act of the Colonial legislature to sue and be sued by a public officer, and an action is brought against that officer in the colony, and judgment is recovered against him there, such judgment may be enforced in this country against a member of the company resident here, although he was not in fact party to the proceedings in the colony (g).

(a) See Story, Conflict of Laws, § 565; 2 Kent's Com. p. 284, ed. 6.

(b) 1 Str. 611.

(c) See for example, *The National Bank of St. Charles v. Bernales*, 1 Car. & P. 569; *South Carolina Bank v. Case*, 8 B. & Cr. 427; *Lewis v. Baldwin*, 11 Beav. 153; *Sudlow v. Dutch Rhenish Rail. Co.*, 21 Beav. 43; *Maclaren v. Stainton*, 16 Beav. 279; *Mackenzie v. Sligo and Shannon Rail. Co.*, 8 Q. B. 862. As to actions for calls, see *Weland Rail. Co. v. Blake*, 6 H. & N. 410.

(d) *Dutch West India Co. v. Moses*, 1 Str. 611.

(e) *The City of Berne v. Bank of England*, 9 Ves. 347.

(f) See *Alivon v. Furnival*, 1 Cr. M. & R. 277, where two out of three Syndics sued successfully, although it was objected that the other ought to have joined.

(g) *Bank of Australasia v. Harding*, 9 C. B. 661; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Kelsall v. Marshall*, 1 C. B. N. S. 241.

APPENDIX I.

Foreign companies.

Privileges of foreign companies.

APPENDIX I.

Residence of
companies.Jurisdiction
over foreign
companies.

Calls made under a Colonial act are simple contract debts (*h*); and never indebted may be pleaded in an action for such calls (*i*).

The residence and domicile of an incorporated company are determined by the situation of its principal place of business. This is not only the opinion of the most recent writers on private International Law (*k*), but is supported by the decisions of our own courts (*l*).

But although a foreign company may have its principal place of business abroad, and be therefore domiciled abroad, it may be sued in the courts of this country if it is in fact amenable to the process of our courts. There is no difference in this respect between a foreign individual and a foreign corporation, except that the individual may be amenable to process both in his person and in his property, whilst a corporation domiciled abroad can, it is conceived, only be amenable to process through its property and its agents. In neither case, however, does the simple fact of a foreign domicile exclude the jurisdiction (*m*).

The jurisdiction of English courts over foreign companies was discussed in *Morris v. Chambres*, 29 Beav. 246, aff. on appeal, 7 Jur. N. S. 689, in which it was held that a mere lien on property situate abroad cannot be enforced here, unless such lien is founded on some contract or transaction creating a personal obligation on the part of the defendant in favour of the plaintiff.

The question whether a foreign company, having its principal place of business abroad, but having an agent and an office for the sale of its goods here, was within the jurisdiction of the English courts, was much discussed in *The Carron Company v. Maclaren* (*n*); and although in that case there was a difference of opinion as to the propriety of making a decree against the company, there appears to have been no difference of opinion as to the mere question of jurisdiction.

Companies formed in this country, for the purpose of carrying on

(*h*) *Welland Rail. Co. v. Blake*, 6 H. & N. 415.

(*i*) *Ib.*

(*k*) See 4 Phill. Int. Law, p. 138, 128, 129; and Westlake, Priv. Int. Law, §§ 55, *et seq.*

(*l*) In *Taylor v. Crowland Gas Company*, 11 Ex. 1, *Adams v. The Great Western Railway Co.*, 6 H. & N. 404, and *Shields v. The Great Northern Railway Co.*; 7 Jur. N. S., 631, it was held that a company dwells (in the sense in which the word is used in the County Court acts) at its principal place of business, *e. g.*, in the case of *The Great Western Railway Company*, at Paddington. Again, in *Minor v. The London and North Western Railway Co.*, 1 C. B. N. S. 325, and *Corbett v. The General Steam Navigation Co.*, 4 H. & N. 482, it was held that a company, whose principal place of business was in London,

but which had an office in a country town, did not carry on business there within the meaning of the same acts. A company registered under the Companies act, 1862, must, at least for all the purposes of that act, be considered as resident in that part of the United Kingdom in which the company's registered office is situate (see §§ 8—10); and for the purpose of determining the court in which an unregistered company is to be wound up under the statute in question, the company is to be treated as registered in that part of the United Kingdom in which its principal place of business is situate (see § 199).

(*m*) See *Maclaren v. Stainton*, 16 Beav. 279, and the judgment of Lord St. Leonards, 5 Ho. Lo. Ca. 450.

(*n*) 5 Ho. Lo. Ca. 416; *Maclaren v. Stainton*, 16 Beav. 279.

business abroad, but having their principal place of business here, are clearly subject to the jurisdiction of English courts (o).

The jurisdiction of the courts of one country over companies domiciled in another country, appears therefore to depend upon whether those companies are, through their property or their agents, amenable to the process of the courts in which the companies are sued. Assuming a foreign company to be amenable to the process of our courts, there is nothing to prevent its being sued or even adjudicated bankrupt here, if it could be so adjudicated were it an English company (p).

Nor is there any reason why such a company should not, partially at all events, be wound up under the Companies act, 1862, if it can be brought within the terms of that act; a question which depends rather upon its construction than upon any general principle of international law (q). How far it is competent for the courts of this country to dissolve a foreign corporation is, however, another matter. They cannot dissolve it except so far as this country is concerned; and to dissolve a corporation as to this country, and to leave it existing as a corporation in its own country, would, to say the least, be productive of great inconvenience.

A foreign company which is amenable to the jurisdiction of the courts of this country may be restrained from suing its own members in the courts of the country where its principal place of business is situate (r). But if disputes between the members, or between the company and strangers, have arisen and been the subject of litigation and been adjudicated upon by a foreign court of competent jurisdiction, its decision will not be reviewed here at the instance of a member resident here and not a party to the proceedings abroad (s).

It has also been decided that an application by a company to a foreign government for further powers ought not to be restrained by the courts of this country (t).

Again, although a corporation duly created in one State, is recognised as a corporation by other States, the transactions of that corporation are governed, not by the law of the State creating it, but by the law of the place where those transactions occur, and by the constitution of the corporation (u). This last is important; for the capacity of a corporation to acquire rights and incur obligations is limited by the objects to attain which it is created, and these limits must be regarded whenever and

APPENDIX I.

Interference
with foreign
companies.

Laws applicable
to the transac-
tions of foreign
companies.

(o) See *Madrid and Valencia Rail. Co.*, 3 De G. & S. 127, and 2 Mac. & G. 169; *Butt v. Monteaux*, 1 K. & J. 98.

(p) See, as to bankruptcy, *Royal Bank of Scotland v. Cuthbert*, 1 Rose 462; and *Forth Marine Ins. Co.*, 9 Beav. 469.

(q) See *ante*, p. 1220, and the cases referred to in 1218.

(r) *Carron Co. v. Maclaren*, 5 Ho. Lo. Ca. 416.

(s) See *Sudlow v. Dutch Rhenish Rail. Co.*, 21 Beav. 43; *Bank of Australasia v. Harding*, 9 C. B. 661, and *v. Nias*, 16 Q. B. 717; *Kelsall v. Marshall*, 1

C. B. N. S. 241. As to suits here and abroad concurrently, see *Bent v. Young*, 9 Sim. 180, and *Transatlantic Co. v. Pietroni*, Johns. 604; and as to the two suits being for the same matter, see *Hunter v. Stewart*, 10 W. R. 176, L. J.

(t) *Bill v. Sierra Nevada, &c., Co.*, 1 De G. F. & J. 177.

(u) In *Branley v. South Eastern Rail. Co.*, 12 C. B. N. S. 63, a contract made by an English company in Boulogne, and valid by the law of France, was held valid, whatever might have been the case if the contract had been made in England.

APPENDIX I.

Foreign com-
panies.

wherever the extent of the corporate powers has to be judicially decided. But it by no means follows that what a corporation can lawfully do in the State where it was created, it can also lawfully do in every other State which recognises its existence. This must always be borne in mind when, as frequently occurs, a company is formed here for the purpose of transacting business in the colonies or in foreign countries. Suppose, for example, that a registered company is formed in England for the purpose of working mines or cultivating estates in a colony. If, by the laws of that colony, a corporation cannot hold lands, the company will not be able to attain its object without obtaining special authority from the proper quarter to hold lands in the colony.

Liabilities of
the members
of foreign com-
panies.

Practically, the most important question which arises with reference to foreign companies, relates to the personal liabilities of their members; and upon this question there is, so far as the writer is aware, no decision or other authority. Upon principle it would seem that if a company is incorporated or otherwise specially privileged, so that, by the constitution of the company, the members are rendered wholly irresponsible, or only to a limited extent responsible, for the debts and engagements of the company, the liability of the members, as such, ought not to be greater in one country than in another. If incorporation and other privileges specially granted are recognised at all, it is difficult to understand upon what principle any more extensive liability than that imposed by the power from whom the incorporation or other privileges proceed, could anywhere be held to exist. But with respect to companies neither incorporated nor enjoying special privileges, the measure of liability in respect of any given transactions, seems, upon principle, to depend upon the law of the place where the transactions in question occurred (*lex loci contractûs*). The law of agency, as administered in that place, would, it is conceived, have to be applied; and the law of the place where the company might be considered as domiciled would only be material for the purpose of determining the authority given by the members to the agents by whom the transactions in question were conducted. See, upon this difficult subject, *Story's Conflict of Laws*, § 320 *a*, and *Westlake's Private Intern. Law*, § 222, *et seq.*

The following convention upon the subject to which this note relates has been concluded between England and France:—

Convention with
France.

“ Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and his Majesty the Emperor of the French having adjudged it expedient to come to an understanding in order to define, within their respective dominions and possessions, the position of commercial, industrial, and financial companies and associations constituted and authorised in conformity with the laws in force in either of the two countries, have resolved to conclude a convention for that purpose, and have named as their plenipotentiaries, that is to say:—

“ Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Hon. Henry Richard Charles Earl Cowley, her Majesty's Ambassador Extraordinary and Plenipotentiary to the Emperor of the French:

“ And his Majesty the Emperor of the French, M. Edouard Antoine Thouvenel, Senator, his Minister and Secretary of State for the Department of Foreign Affairs:

“ Who, after having communicated to each other their respective ful

powers, found in good and due form, have agreed upon and concluded the following articles:—

APPENDIX I.

Convention with
France.

“Art. I. The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals whether for the purpose of bringing an action, or for defending the same, throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions.

“Art. II. It is agreed that the stipulations of the preceding article shall apply as well to companies and associations, constituted and authorised previously to the signature of the present convention, as to those which may subsequently be so constituted and authorised.

“Art. III. The present convention is concluded without limit as to duration. Either of the high powers shall, however, be at liberty to terminate it by giving to the other a year's previous notice. The two high powers, moreover, reserve to themselves the power to introduce into the convention, by common consent, any modifications which experience may show to be desirable.

“Art. IV. The present convention shall be ratified and the ratifications shall be exchanged in Paris in fifteen days, or sooner if possible.

“In witness whereof the respective plenipotentiaries have signed the same, and have affixed thereto the seals of their arms.

“Done in duplicate at Paris, the 30th of April, 1862.

“COWLEY.

“THOUVENEL.”

A similar convention has been made with Belgium. See the London Gazette of 9th Dec., 1862.

No. II.

INDUSTRIAL AND PROVIDENT SOCIETIES.

APPENDIX II.

INDUSTRIAL and Provident Societies, as governed by the Industrial and provident societies act, 1862 (25 & 26 Vict. c. 87), are a peculiar kind of limited joint-stock company. Any number of persons, not less than seven, may form a society under the act in question, "for the purpose of carrying on any labour, trade, or handicraft, whether wholesale or retail (except the working of mines and quarries and the business of banking), and of applying the profits for any purpose allowed by the Friendly societies acts, or *otherwise permitted by law*" (§ 3). Such a society is formed by being registered by the registrar of friendly societies; and, when registered, it becomes a body corporate by its registered name, having a perpetual succession and a common seal, with power to hold lands and buildings, and with limited liability (§ 5).

The registrar's certificate is conclusive evidence that the society has been duly registered (§ 5) (*a*), and vests in the society all property that may at the time be vested in any person in trust for it (§ 6) (*b*).

The society, being incorporated, must, of course, sue and be sued by its corporate name; and its members are individually liable for its debts and engagements only so far as the statute declares. As in the case of companies registered under the Companies act, 1862, so in the case of societies registered under the act now in question, the members are not liable to have executions issued against them in respect of judgment obtained against the society. The members can only be reached individually by the process of winding up (*c*). For the protection of creditors, however, the society is bound to have a registered office (§§ 12 and 13), and to use the word limited as is required in the case of companies registered, with limited liability, under the Companies act, 1862 (§§ 10 and 11). The penalties in case of default are similar under both acts (*d*).

The act declares that "The provisions of the Friendly societies acts (*e*) shall apply to societies registered under this act in the following particulars:—Exemption from stamp duties and income tax:—Settlements of disputes by arbitration or justices (*f*):—Compensation to members unjustly

(*a*) See *ante*, p 165.

(*b*) See *Queensbury Industrial Society v. Pickles*, L. R. 1 Ex. 1.

(*c*) But see *Dean v. Mellard*, 15 C. B. N. S. 19; *Linton v. Blakeney Industrial School*, 3 H. & C. 853, and *Gray v. Raper*, L. R. 1 C. P. 694, as to debts contracted before registration; and see the last case as to staying actions when the society is being wound up.

(*d*) Compare §§ 10—13 of the Industrial and provident societies act, 1862, with §§ 39—42 of the Companies act, 1862. The sections, though substantially, are not exactly alike.

(*e*) 18 & 19 Vict. c. 63; 21 & 22 Vict. c. 101, and 23 & 24 Vict. c. 58.

(*f*) The leading cases on this subject are *Fleming v. Self*, Kay, 518, and 3 De G. Mac. & G. 997; *Farmer v. Giles*, 5

excluded:—Power of justices or county courts in case of fraud:—Jurisdiction of the registrar (§ 15). The act also declares that the provisions of the Joint-stock companies acts, as to bills of exchange and the admissibility of the register of shares in evidence shall apply to all societies registered under the act (§ 19).

The expression “Joint-stock companies acts” in the above section is unfortunate. It can, it is conceived, only properly apply to those acts relating to joint-stock companies which were in force at the time of the passing of the statute in which the expression itself occurs—*i. e.*, on the 7th August, 1862. All such acts, however, are repealed by the Companies acts, 1862, which was passed on the same day, but which only came into operation on the 2nd November following.

The Industrial and provident societies act, 1862, contains little respecting the management of the affairs of a society registered under it, or the rights of its members. The act declares that no member shall be entitled, in any society registered under it, to hold or claim any interest exceeding the sum of 200*l.* (§ 9); and that it shall be lawful for members to nominate persons to whom their interests may be transferred or paid on their deaths (§ 16); and that every person or member having any interest in the funds of the society may inspect the books and names of the members at all reasonable hours, at the office of the society (§ 22). Subject, however, to these enactments, and to those contained in § 15, which has been already alluded to, the rights of the members *inter se*, and the management of the society's affairs, are left to be provided for by the rules of the society. These rules must be certified and registered by the registrar of friendly societies (4, 5, and 15); and a copy of them must be delivered by the society to any person on demand, on payment of a sum not exceeding one shilling (§ 7). The rules are required by the statute (§ 4) to contain provisions in respect of the following matters:—

1. Object, and name and place of office, of the society, which must, in all cases, be registered as one of limited liability.
2. Terms of admission of members.
3. Mode of holding meetings, and right of voting and of making or altering rules.
4. Determination whether the shares shall be transferable, and, in case it be determined that the shares shall be transferable, provision for the form of transfer and registration of shares (*g*), and for the consent of the committee of management, and confirmation by the general meeting of the society; and, in case shares shall not be transferable, provision for paying to members the balance due to them on withdrawing from the society.
5. Provision for the audit of accounts.
6. Power to invest part of capital in another society; provided that no such investment be made in any other society not registered under this

H. & N. 753; *Morrison v. Glover*, 4 Ex. 430; *Outbill v. Kingdom*, 1 Ex. 494; *R. v. Trafford*, 4 E. & B. 122; *Kelsall v. Tyler*, 11 Ex. 543; *Smith v. Lloyd*, 26 Beav. 507, in which it was held that the provisions as to arbitration did not apply; and *Crisp v. Bunbury*, 8 Bing.

394, and *Reeves v. White*, 17 Q. B. 995; *R. v. Mildenhall Savings Bank*, 6 A. & E. 952; *Timms v. Williams*, 3 Q. B. 413; where it was held that they did.

(*g*) There is no clause in the act expressly requiring a register of shares to be kept.

APPENDIX II.

act or the Joint-stock companies act, as a society or company with limited liability.

7. Power and mode of withdrawing from the society, and provisions for the claims of executors, administrators, or assigns of members.

8. Mode of application of profits.

9. Appointment of managers and other officers, and their respective powers and remuneration.

The act in question does not contain any form of rules; but in framing them it will be found convenient to adhere as closely as possible to those given in Table A. in the 1st schedule to the Companies act, 1862.

The rules bind the members as if they had entered into a covenant to observe them (§ 14).

Societies registered under the act in question may be wound up under the Companies act, 1862, either by the court or voluntarily: but the court, having jurisdiction over the winding up, is the county court of the district in which the society's registered office is situate (§ 17). Societies not registered under the act in question, but capable of being registered under it, cannot be wound up in chancery, but must be registered, and then be wound up in the county court (*h*).

The 17th section of the Industrial and provident societies act, 1862, must be read with the 199th section of the Companies act, 1862. The two sections are not altogether consistent, but their joint effect seems to be that a society registered under the former act must be treated as an unregistered company within the meaning of the latter act, but at the same time as one capable of being wound up voluntarily as if it were registered under such act.

With respect to contributories and their liabilities, the Industrial and provident societies act, 1862, declares (§ 20) that, in the event of a society registered under that act being wound up, every present and past member of such society shall be liable to contribute to the assets of the society to an amount sufficient for the payment of the debts and liabilities of the society, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves with the qualifications following (that is to say):

- (1.) No past member shall be liable to contribute to the assets of the society if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up.
- (2.) No past member shall be liable to contribute in respect of any debt or liability of the society contracted after the time at which he ceased to be a member.
- (3.) No past member shall be liable to contribute to the assets of the society, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in order to satisfy all just demands upon such society.
- (4.) No contribution shall be required from any member exceeding the amount (if any) unpaid on the shares, in respect of which he is liable as a past or present member (*i*).

(*h*) *Midland Counties Benefit Building Soc.*, 10 Jur. N. S. 505; *Chatham Industrial Co-operative Soc.*, *ib.* 983; *Rotherhithe, &c., Soc.*, 32 Beav. 57; *Fountain's case*, 11 Jur. N. S. 553.
(*i*) Compare the Companies act, 1862

In the event of dissolution, the society is to be considered as subsisting, so long and so far as any matters relating to the same remain unsettled, to the intent that the society may do whatever is necessary for winding up its concerns (§ 18) (k).

Lastly, any society registered under the Industrial and provident societies act, 1862, may register under the Companies act, 1862; and upon such registration the society ceases to retain its registration under the first act (§ 21). See, too, the Companies act, 1862 (§ 180).

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(§ 38). See *Fountain's case*, 11 Jur. N. S. 553, L. C. as to liability in respect of debts contracted before registration.

(k) As to paying the whole assets to the last surviving member, see *Spiller v. Maude*, 10 Jur. N. S. 1089.

No. III.

CHRONOLOGICAL LIST OF STATUTES RELATING TO
COMPANIES.

APPENDIX III.

List of statutes.

The following is a chronological list of (it is believed) all the general statutes which have from time to time been passed, affecting English joint-stock and other companies, and having any direct bearing on the law of partnership as applied to them (a):—

1719. 6 Geo. 18, c. 1.—This is the celebrated “Bubble act.”

Section 12, prohibiting marine insurance by partners, was repealed by 5 Geo. 4, c. 114; and sections 18 & 19, prohibiting joint-stock companies with transferable shares, were repealed by 6 Geo. 4, c. 91. These last sections will be found *ante*, p. 145.

1788. 28 Geo. 3, c. 53.—Section 2 (repealed by 6 & 7 Wm. 4, c. 109), prohibited partnerships of coal-merchants.

1800. 39 & 40 Geo. 3, c. 28.—Section 15 prohibited banking partnerships of more than six persons; but the act was, in this respect, repealed by 7 Geo. 4, c. 46.

1824. 5 Geo. 4, c. 114.—This act repealed 6 Geo. 1, c. 18, § 2.

1825. 6 Geo. 4, c. 91.—This repealed 6 Geo. 1, c. 18, §§ 18 & 19.

Section 2 (repealed by 7 Wm. 4 & 1 Vict. c. 73) empowered the Crown, in charters of incorporation, to provide that the members of the incorporated body should be individually liable for its debts.

1826. 7 Geo. 4, c. 46.—Repealed 39 & 40 Geo. 3, c. 28, § 15.

Provided for the establishment of joint-stock banking companies with public officers, by whom they could sue and be sued.

Amended by 1 & 2 Vict. c. 96, and 3 & 4 Vict. c. 111; and as to the issue of notes, &c., by bankers, by 3 & 4 Wm. 4, c. 83; *ib.* c. 98; 4 & 5 Vict. c. 50; 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 76.

Repealed, as to companies formed since May, 1844, by 7 & 8 Vict. c. 113; and as to companies formed before that time, but registered under the acts of 1856 and 1857, by 20 & 21 Vict. c. 49.

Still in force as to companies formed before May, 1844, and not registered under the acts of 1856-8 or 1862.

1833. 3 & 4 Wm. 4, c. 83.—An act to compel banks issuing promissory notes, payable to bearer on demand, to make returns of their notes in circulation, and to authorise banks to issue notes payable in London for less than 50*l.*

See too 3 & 4 Wm. 4, c. 98; 4 & 5 Vict. c. 50; 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 76.

(a) See *ante*, p. 5, for a sketch of the history of companies.

1833. 3 & 4 Wm. 4, c. 98.—Relates to the issue of notes, &c., by bankers. See the note on the last act. APPENDIX III.
List of statutes.
1834. 4 & 5 Wm. 4, c. 94.—Authorised the crown, by letters patent, to empower companies to sue and be sued by their principal officers.
Repealed by 7 Wm. 4 & 1 Vict. c. 73.
1836. 6 & 7 Wm. 4, c. 109.—Repealed 28 Geo. 3, c. 53.
1837. 7 Wm. 4 & 1 Vict. c. 73.—The Companies letters patent act.
Repealed 6 Geo. 4, c. 91, § 2, and 4 & 5 Wm. 4, c. 94.
Empowers the Crown to grant companies the privilege of suing and being sued in the name of an officer of the company, and to limit the liability of the shareholders to creditors.
1838. 1 & 2 Vict. c. 10.—This act resembled the 4 & 5 Vict. c. 14, but applied only to companies formed before the then Session of Parliament.
1838. 1 & 2 Vict. c. 96.—Amended 7 Geo. 4, c. 46.
Continued by 2 & 3 Vict. c. 68; and 3 & 4 Vict. c. 111.
Made perpetual by 5 & 6 Vict. c. 85.
1838. 1 & 2 Vict. c. 110.—Sections 14 & 15 rendered shares of debtors, held in public companies, available for the payment of judgment creditors, by means of charging orders.
Amended by 3 & 4 Vict. c. 82.
1839. 2 & 3 Vict. c. 68.—Continued 1 & 2 Vict. c. 96; as to which see above.
1840. 3 & 4 Vict. c. 82.—Amended 1 & 2 Vict. c. 110, §§ 14 & 15.
1840. 3 & 4 Vict. c. 111.—Continued 1 & 2 Vict. c. 96; and further amended 7 Geo. 4, c. 46.
1841. 4 & 5 Vict. c. 14.—Authorises spiritual persons to hold shares in companies.
1841. 4 & 5 Vict. c. 50.—Relates to the issue of notes by bankers. See observations on 3 & 4 Wm. 4, c. 83.
1841. 5 Vict. c. 5, § 4.—Authorises the restraining of transfers of shares.
1842. 5 & 6 Vict. c. 85.—Perpetuated 1 & 2 Vict. c. 96.
1844. 7 & 8 Vict. c. 110.—Commonly called The Joint-stock companies registration act of 1844.
The first act which provided for incorporation by mere registration.
Amended by 10 & 11 Vict. c. 78; 18 & 19 Vict. c. 133.
Repealed by the acts of 1856-8, and by the Companies act, 1862.
1844. 7 & 8 Vict. c. 111.—Provided for the winding up of companies in bankruptcy.
Amended by 11 & 12 Vict. c. 45, and 20 & 21 Vict. c. 78.
Repealed by the Companies act, 1862.
1844. 7 & 8 Vict. c. 113.—An act to regulate Joint-stock banks in England.
Repealed 7 Geo. 4, c. 46, as regards companies formed since May, 1844.
Extended to Scotland and Ireland by 9 & 10 Vict. c. 75.
Amended by 19 & 20 Vict. c. 100.
Repealed by 20 & 21 Vict. c. 49, and by the Companies act, 1862.

APPENDIX III.

List of statutes.

1845. 8 & 9 Vict. c. 16.—An act for consolidating in one act certain provisions usually inserted in acts, with respect to the constitution of companies incorporated for carrying on undertakings of a public nature.
The Companies clauses consolidation act.
Amended by 26 & 27 Vict. c. 118.
The Lands clauses consolidation act (8 & 9 Vict. c. 18), and the Railways clauses consolidation act (8 & 9 Vict. c. 20), do not form part of the law of partnership.
1846. 9 & 10 Vict. c. 28.—An act to facilitate the dissolution of certain railway companies.
This act (Lord Dalhousie's) only applied to railway companies projected before July, 1846, and never incorporated by act of parliament.
Repealed by the Companies act, 1862.
1846. 9 & 10 Vict. c. 75.—Extended 7 & 8 Vict. c. 113, to Scotland and Ireland.
1847. 10 & 11 Vict. c. 78.—Amended 7 & 8 Vict. c. 110.
1848. 11 & 12 Vict. c. 45.—Amended 7 & 8 Vict. c. 111.
Amended by 12 & 13 Vict. c. 108; and by 20 & 21 Vict. c. 78.
Repealed by the Companies act, 1862.
This act and the next are usually called the Winding-up acts of 1848—9.
1849. 12 & 13 Vict. c. 108.—Amended the last act.
Repealed by the Companies act, 1862.
1850. 13 & 14 Vict. c. 83.—Passed to facilitate the abandonment of railways, and the dissolution of railway companies, empowered to make railways by acts passed before August, 1850.
This act is still in force.
1855. 18 & 19 Vict. c. 133.—The first limited liability act.
Repealed by 19 & 20 Vict. c. 47.
1856. 19 & 20 Vict. c. 47.—The Joint-stock companies act, 1856.
Repealed, as to all companies registered under it, 7 & 8 Vict. c. 110 and 111; 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108; 18 & 19 Vict. c. 133.
Explained, as to insurance companies, by 20 & 21 Vict. c. 80.
Extended to banking companies by 20 & 21 Vict. c. 49.
Amended by 20 & 21 Vict. c. 14; and 21 & 22 Vict. c. 60.
Repealed by the Companies act, 1862.
1856. 19 & 20 Vict. c. 100.—Amended 7 & 8 Vict. c. 113.
Repealed by the Companies act, 1862.
1857. 20 & 21 Vict. c. 14.—Amended 19 & 20 Vict. c. 47, as to which see above.
Repealed by the Companies act, 1862.
1857. 20 & 21 Vict. c. 49.—The Joint-stock banking companies act, 1857.
Extended 19 & 20 Vict. c. 47 to banking companies.
Repealed as to companies registered under it, 7 Geo. 4, c. 46; 7 & 8 Vict. cc. 111, 113; 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108.
Amended by 21 & 22 Vict. cc. 60, 91.
Repealed by the Companies act, 1862.
1857. 20 & 21 Vict. c. 54.—An act to make better provision for the

punishment of frauds committed by trustees, bankers, and other persons entrusted with property.

APPENDIX III.

List of statutes.

Applied to frauds by directors of companies.

Repealed by 24 & 25 Vict. c. 95.

1857. 20 & 21 Vict. c. 78.—Amended the act 7 & 8 Vict. c. 111, and also the “Joint-stock companies winding-up acts, 1848 and 1849.”

Repealed by the Companies act, 1862.

1857. 20 & 21 Vict. c. 80.—Explained 19 & 20 Vict. c. 47, as regards insurance companies.

Repealed by the Companies act, 1862.

1858. 21 & 22 Vict. c. 60.—Amended the Joint-stock companies acts, 1856 and 1857, and the Joint-stock banking companies act, 1857.

Repealed by the Companies act, 1862.

1858. 21 & 22 Vict. c. 91. Enabled joint-stock banking companies to be formed on the principle of limited liability.

Amended 20 & 21 Vict. c. 49.

Repealed by the Companies act, 1862.

1861. 24 & 24 Vict. c. 96. The Larceny act, applies to frauds by directors, &c.

1862. 25 & 26 Vict. c. 87. The Industrial and provident societies act, 1862.

1862. 25 & 26 Vict. c. 89. The Companies act, 1862.

1863. 26 & 27 Vict. c. 118.—Amended 8 & 9 Vict. c. 16.

1864. 27 & 28 Vict. c. 19. The Companies seals act.

1865. 28 & 29 Vict. c. 86. Law of partnership amended act.

The table on p. 11 shows the present state of the statutory law relating to companies. The following table shows the state in which it was before the passing of the Companies act, 1862:—

TABULAR VIEW OF STATUTES PRIOR TO 1862.

PRINCIPAL ACTS.		AMENDING AND REPEALING ACTS.	
6 Geo. 1, c. 18	The Bubble act, prohibited by § 12, Maritime insurances, &c. by partners, &c.	repealed by	5 Geo. 4, c. 114.
	§§ 18 & 19, joint-stock companies with transferable shares	repealed by	6 Geo. 4, c. 91.
39 & 40 Geo. 3, 28, § 15	Bank act prohibiting banking partnerships of more than six persons	repealed by	7 Geo. 4, c. 46.
6 Geo. 4, c. 91, § 2	Chartered companies	repealed by	7 Wm. 4. & 1 Vict. c. 73.
		generally by	3 & 4 Wm. 4, c. 98.
		as to issue of notes, &c. by	1 & 2 Vict. c. 96†. 3 & 4 Vict. c. 111. 3 & 4 Wm. 4, c. 83. 4 & 5 Vict. c. 50. 7 & 8 Vict. c. 32. 8 & 9 Vict. c. 76.
7 Geo. 4, c. 46*	Banking companies*	repealed as to companies formed	since May, 1844, by before May, 1844, if re- gistered un- der acts of 1856-8, by
			7 & 8 Vict. c. 113.
4 & 5 Wm. 4, c. 94	Companies empowered by letters patent to sue and be sued	repealed by	20 & 21 Vict. c. 49. 7 Wm. 4, & 1 Vict. c. 73.
7 Wm. 4, & 1 Vict. c. 73	Ditto.	still in force	
1 & 2 Vict. c. 10	Spiritual persons (retrospective).		
1 & 2 Vict. c. 110	Charging shares by Judge's order	amended by	3 & 4 Vict. c. 82.
4 & 5 Vict. c. 14	Spiritual persons.		
5 Vict. c. 5	Authorises restraining of transfers of shares.		
7 & 8 Vict. c. 110*	The Joint-stock companies registration act*	amended by	10 & 11 Vict. c. 78. 18 & 19 Vict. c. 133.
7 & 8 Vict. c. 111*	Winding up in bankruptcy*	amended by	11 & 12 Vict. c. 45. 20 & 21 Vict. c. 78.
7 & 8 Vict. c. 113	Banking companies (formed after May, 1844)	extended to Scotland and Ireland by amended by repealed by	9 & 10 Vict. c. 75. 19 & 20 Vict. c. 100. 20 & 21 Vict. c. 49.
8 & 9 Vict. c. 16	The Companies clauses consolidation act.		
9 & 10 Vict. c. 28	Winding-up act for railways projected before July, 1846, and not incorporated by act of Parliament.		
11 & 12 Vict. c. 45*	The General Winding-up acts of 1848 & 1849	amended by	20 & 21 Vict. c. 78.
12 & 13 Vict. c. 108*			
13 & 14 Vict. c. 83			
18 & 19 Vict. c. 133	Winding-up act for railway companies incorpo- rated by a special act of Parliament.		
	Limited liability act, 1855	repealed by	19 & 20 Vict. c. 47.
19 & 20 Vict. c. 47 }	The Joint-stock companies acts of 1856, 7.	explained as to insurance companies by	20 & 21 Vict. c. 80.
20 & 21 Vict. c. 14 }		extended to banking companies by	20 & 21 Vict. c. 49.
		amended by	21 & 22 Vict. c. 60.
20 & 21 Vict. c. 54	Frauds of directors, bankers, and trustees.		
20 & 21 Vict. c. 49 }	The Joint-stock banking companies acts of 1857-8	amended by	21 & 22 Vict. c. 60.
21 & 22 Vict. c. 91 }			

* The acts marked with an asterisk were repealed as to companies registered under the acts of 1856-8.

† The 1 & 2 Vict. c. 96, was continued by 2 & 3 Vict. c. 68, and 3 & 4 Vict. c. 111, and was made perpetual by 5 & 6 Vict. c. 85.

From the above table it appears that in addition to the Companies clauses consolidation act (8 & 9 Vict. c. 16), there were, prior to the passing of the Companies act, 1862, no less than seven classes of acts regulating joint-stock companies. These acts were as follows :—

APPENDIX III.

List of statutes.

1. 7 Geo 4, c. 46, and acts amending it; as to banking companies established before May, 1844, and not registered under 20 & 21 Vict. c. 49.

2. 7 Wm. 4 & 1 Vict. c. 73; as to companies established by letters patent from the Crown.

3. 7 & 8 Vict. c. 110, and acts amending it; as to insurance companies, and such other companies, if any, as were registered under it, and not under 19 & 20 Vict. c. 47.

4. The Winding-up acts, 7 & 8 Vict. c. 111; 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108; 20 & 21 Vict. c. 78; as to companies not registered under 19 & 20 Vict. c. 47, and not a railway company incorporated by act of Parliament.

5. The Winding-up act, 13 & 14 Vict. c. 83; as to railway companies incorporated by act of Parliament, and empowered to make a railway by an act passed before August, 1850.

6. The Joint-stock companies acts of 1856 and 1857; as to all joint-stock companies registered under them.

7. The Joint-stock banking companies acts of 1857 and 1858; as to banking companies formed since May, 1844, or formed previously thereto and registered under these acts.

Of these the 3d, 4th, 6th and 7th are all repealed by the Companies act, 1862 (b).

(b) See the table *ante*, p. 11.

No. IV.

TABLE SHOWING WHICH SECTIONS OF THE ACTS OF 1856—1858
HAVE BEEN INCORPORATED IN THE COMPANIES ACT, 1862 (a).

APPENDIX IV.	19 & 20 Vict. c. 47.	Corresponding sections in 25 & 26 Vict. c. 89.	19 & 20 Vict. c. 47.	Corresponding sections in 25 & 26 Vict. c. 89.
	Sect. 3	6	Sect. 37	12, 34
	„ 4	4	„ 38	21
	„ 5	8	„ 39	48
	„ 6	20	„ 40	67
	„ 7	11	„ 42	55
	„ 8	23	„ 43	47
	„ 9	14, 15	„ 48	56
	„ 10	16	„ 49	58
	„ 11	11, 16	„ 50	59
	„ 12	17	„ 51	60
	„ 13	12, 18	„ 52	61
	„ 15	22	„ 53	62
	„ 16	25	„ 54	63
	„ 17	26	„ 55	64
	„ 18	25, 27	„ 56	65
	„ 19	23, 30	„ 57	66
	„ 21	31	„ 58	71
	„ 23	32	„ 60	81, 120
	„ 24	33	„ 61	38
	„ 25	32, 35	„ 62	38
	„ 26	37	„ 63	38
	„ 27	19	„ 64	84, 130
	„ 28	39	„ 65	74, 76
	„ 29	40	„ 67	79
	„ 30	41	„ 68	80, 199
	„ 31	42	„ 69	82
	„ 32	49	„ 70	86
	„ 33	50	„ 71	86
	„ 34	51	„ 72	86
	„ 35	53	„ 73	88, 153,
	„ 36	54		198, 202

(a) Very few of the provisions of the repealed acts have been re-enacted without some alteration of more or less moment. The most important sections contained in the act of 1856, but omitted from the new act, are the 14th, which

related to the payment of dividends when a company was insolvent; the 41st, which made contracts binding, though not under seal; and the 44th to the 47th, relating to mortgages and conveyances.

19 & 20 Vict. c. 47.	Corresponding sections in 25 & 26 Vict. c. 89.	20 & 21 Vict. c. 14.	Corresponding sections in 25 & 26 Vict. c. 89.	APPENDIX IV.
Sect. 74 . . .	81	Sect. 8 . . .	35	
„ 75 . . .	98	„ 9 . . .	35	
„ 76 . . .	164	„ 10 . . .	19	
„ 77 . . .	115	„ 11 . . .	118	
„ 78 . . .	117	„ 13 . . .	75	
„ 79 . . .	166	„ 17 . . .	161	
„ 80 . . .	163	„ 18 . . .	139	
„ 81 . . .	154	„ 19 . . .	146, 147	
„ 82 . . .	102	„ 20 . . .	113	
„ 83 . . .	103	„ 22 . . .	71	
„ 84 . . .	85, 107, 197, 201	„ 24 . . .	69	
„ 85 . . .	89	„ 28 . . .	210	
„ 86 . . .	109	„ 29 . . .	180	
„ 87 . . .	110	„ 30 . . .	185	
„ 88 . . .	92	„ 32 . . .	189	
„ 89 . . .	94	„ 33 . . .	196	
„ 90 . . .	95			
„ 91 . . .	97	20 & 21 Vict. c. 49.		
„ 92 . . .	93	Sect. 8 . . .	194	
„ 93 . . .	111	„ 10 . . .	195	
„ 94 . . .	112	„ 13 . . .	4	
„ 95 . . .	170			
„ 96 . . .	173	21 & 22 Vict. c. 60.		
„ 97 . . .	171	Sect. 2 . . .	148 & 149	
„ 98 . . .	172	„ 3 . . .	150 & 149	
„ 101 . . .	126	„ 4 . . .	151	
„ 102 . . .	129	„ 5 . . .	121	
„ 103 . . .	132	„ 6 . . .	87	
„ 104 . . .	131, 133 & 142—144	„ 7 . . .	156	
„ 105 . . .	145	„ 8 . . .	152	
„ 106 . . .	174	„ 9 . . .	96	
„ 112 . . .	186	„ 10 . . .	159	
„ 113 . . .	191	„ 11 . . .	170	
„ 114 . . .	190	„ 12 . . .	122	
„ 115 . . .	192	„ 13 . . .	123	
„ 116 . . .	194, 195	„ 14 . . .	138	
Table B. . .	Table A.	„ 15 . . .	140	
		„ 17 . . .	38 & 101	
		„ 19 . . .	160	
		„ 20 . . .	167	
		„ 21 . . .	168	
20 & 21 Vict. c. 14.				
Sect. 3 . . .	4	21 & 22 Vict. c. 91.		
„ 4 . . .	18	Sect. 1 . . .	182	
„ 5 . . .	29	„ 3 . . .	188	
„ 6 . . .	28	„ 4 . . .	44	
„ 7 . . .	29			

No. V.

THE COMPANIES ACT, 1862.

25 & 26 VICT. CAP. 89.*

An act for the incorporation, regulation, and winding up of trading companies and other associations.
[7th August, 1862.]

APPENDIX V.

WHEREAS it is expedient that the laws relating to the incorporation, regulation, and winding up of trading companies and other associations should be consolidated and amended: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This act may be cited for all purposes as "The Companies act, 1862."

Commencement of act.

2. This act, with the exception of such temporary enactment as is hereinafter declared to come into operation immediately (*b*), shall not come into operation until the second day of November, one thousand eight hundred and sixty-two, and the time at which it so comes into operation is hereinafter referred to as the commencement of this act.

Definition of insurance company.

3. For the purposes of this act, a company that carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company (*c*).

Prohibition of partnerships exceeding certain number.

4. No company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this act, for the purpose of carrying on the business of banking (*d*), unless it is registered as a company under this act, or is formed in pursuance of some other act of Parliament or letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this act, or is formed in pursuance of some

[20 Vict. c. 47, § 4, and 21 Vict. c. 14, § 3, and c. 49, § 13.]

* The references in the margins of the sections are to the corresponding sections of the repealed Acts. The sections referred to have seldom been incorporated without some alteration of more or less importance.

(*b*) See § 209.

(*d*) See *District Savings Bank*, 10

(*c*) See *London Monetary Co. v. W. R.* 138.

Smith, 3 H. & N. 543, *ante*.

other act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries (e).

APPENDIX V.

5. This act is divided into nine parts, relating to the following subject matters: Division of act.

The first part.—To the constitution and incorporation of companies and associations under this act:

The second part.—To the distribution of the capital and liability of members of companies and associations under this act:

The third part.—To the management and administration of companies and associations under this act:

The fourth part.—To the winding up of companies and associations under this act:

The fifth part.—To the registration office:

The sixth part.—To application of this act to companies registered under the Joint-stock companies acts:

The seventh part.—To companies authorised to register under this act:

The eighth part.—To application of this act to unregistered companies:

The ninth part.—To repeal of acts, and temporary provisions.

PART I.

CONSTITUTION AND INCORPORATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Memorandum of association (f).

6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability (g). Mode of forming company. [25 Vict. c. 47, § 3.]

7. The liability of the members of a company formed under this act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up Mode of limiting liability of members.

8. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things; (that is to say) (h). Memorandum of association of a company limited by shares.

(1.) The name of the proposed company, with the addition of the word "limited" as the last word in such name (i): [20 Vict. c. 47, § 5.]

(2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate:

(e) See p. 198.

(g) See Form A. in Sched. 2.

(f) For Forms, see Sched. 2. See ante, p. 169.

(h) See § 179, cl. 1.

(i) See ante, p. 169.

APPENDIX V.

Memorandum of association of a company limited by guarantee.

- (3.) The objects for which the proposed company is to be established :
 - (4.) A declaration that the liability of the members is limited :
 - (5.) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount :
- Subject to the following regulations :

- (1.) That no subscriber shall take less than one share :
 - (2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.
9. Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things (*k*) ; (that is to say),

- (1.) The name of the proposed company, with the addition of the word " Limited " as the last word in such name :
- (2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate :
- (3.) The objects for which the proposed company is to be established :
- (4.) A declaration that each member undertakes to contribute to the assets of the company in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount.

Memorandum of association of an unlimited company.

[20 Vict. c. 47, § 10.]

10. Where a company is formed on the principle of having no limit placed on the liability of its members, hereinafter referred to as an unlimited company, the memorandum of association shall contain the following things (*l*) ; (that is to say),

- (1.) The name of the proposed company :
- (2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate :
- (3.) The objects for which the proposed company is to be established.

Stamp, signature, and effect of memorandum of association.

[20 Vict. c. 47, §§ 7 and 11.]

11. The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of and be attested by, one witness at the least, and that attestation shall be a sufficient attestation in Scotland as well as in England and Ireland : it shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this act.

(*k*) See Forms B. and C. Sched. 2 ; and as to the capital, see § 14.

(*l*) Form D. in Sched. 2 ; and see, as to capital, § 14.

12. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned (*m*), as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name (*n*), no alteration shall be made by any company in the conditions contained in its memorandum of association (*o*).

13. Any company under this act, with the sanction of a special resolution of the company passed in manner hereinafter mentioned (*p*), and with the approval of the Board of Trade, testified in writing under the hand of one of its secretaries or assistant secretaries, may change its name (*q*), and upon such change being made, the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

Articles of association.

14. The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association (*r*) signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient: the articles shall be expressed in separate paragraphs, numbered arithmetically: they may adopt all or any of the provisions contained in the Table marked A. in the first schedule hereto: they shall, in the case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered (*s*); and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration: in a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes.

(*m*) See §§ 50 and 51.

(*n*) See §§ 13 and 20.

(*o*) As to altering the regulations of the company, see §§ 50, 176 and 196; and see *ante*, pp. 573, 582; and see 28 & 29 Vict. c. 78, § 3, as to mortgage debentures.

(*p*) See § 51.

(*q*) See, further, as to changing name, § 20.

(*r*) See Forms B. and C. in Sched. 2.

(*s*) The capital of companies limited by shares appears in the memorandum of association. See § 8.

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Power of certain companies to alter memorandum of association.

[20 Vict. c. 47, §§ 13 and 37.]

Power of companies to change name.

Regulations to be prescribed by articles of association.

[20 Vict. c. 47, § 9.]

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Application of
Table A.[20 Vict. c. 47,
§ 9.]Stamp, signa-
ture, and effect
of articles of
association.[20 Vict. c. 47,
§§ 10 and 11.]

15. In the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in the Table marked A. in the first schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in articles of association, and the articles had been duly registered.

16. The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in Scotland as well as in England and Ireland; when registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations contained in such articles, subject to the provisions of this act; and all monies payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt (*t*).

*General provisions.*Registration of
memorandum of
association and
articles of asso-
ciation, with fees
as in Table B.[20 Vict. c. 47,
§ 12.]

17. The memorandum of association and the articles of association, if any, shall be delivered to the registrar of joint-stock companies herein-after mentioned, who shall retain and register the same: there shall be paid to the registrar by a company having a capital divided into shares, in respect of the several matters mentioned in the Table marked B. in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct; and by a company not having a capital divided into shares, in respect of the several matters mentioned in the Table marked C. in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct: all fees paid to the said registrar in pursuance of this act shall be paid into the receipt of her Majesty's exchequer, and be carried to the account of the consolidated fund of the United Kingdom of Great Britain and Ireland.

Effect of regis-
tration.[20 Vict. c. 47,
§ 13, and 21
Vict. c. 14,
§ 4.]

18. Upon the registration of the memorandum of association, and of the articles of association in cases where articles of association are required by this act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited: the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands (*u*), but with such liability on the part of the members

(*t*) See § 75.(*u*) As to companies not having gain for their object, see § 21.

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to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned: a certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this act in respect of registration have been complied with (*x*).

19. A copy of the memorandum of association, having annexed thereto the articles of association, if any, shall be forwarded to every member, at his request, on payment of the sum of one shilling or such less sum as may be prescribed by the company for each copy; and if any company makes default in forwarding a copy of the memorandum of association and articles of association, if any, to a member, in pursuance of this section, the company so making default shall for each offence incur a penalty not exceeding one pound.

Copies of memorandum and articles to be given to members.

[20 Vict. c. 47, § 27, and 21 Vict. c. 14, § 10.]

20. No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved and testifies its consent in such manner as the registrar requires; and if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name, and upon such change being made the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name (*y*).

Prohibition against identity of names in companies.

[20 Vict. c. 47, § 6.]

21. No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land; but the Board of Trade may, by licence (*z*), under the hand of one of their principal secretaries or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit.

Prohibition against certain companies holding land.

[20 Vict. c. 47, § 38.]

(*x*) See, as to this, p. 165; see also § 13; and see *ante*, p. 166.
§ 192.

(*z*) See Form F. in Sched. 2.

(*y*) See further, as to changing name,

PART II.

APPENDIX V. DISTRIBUTION OF CAPITAL AND LIABILITY OF MEMBERS OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Distribution of capital.

Nature of interest in company.
[20 Vict. c. 47, § 15.]

22. The shares or other interest of any member in a company under this act shall be personal estate (*a*), capable of being transferred in manner provided by the regulations of the company (*b*), and shall not be of the nature of real estate, and each share shall, in the case of a company having a capital divided into shares, be distinguished by its appropriate number (*c*).

Definition of "member."
[20 Vict. c. 47, §§ 8 and 19.]

23. The subscribers of the memorandum of association of any company under this act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this act, and whose name is entered on the register of members, shall be deemed to be a member of the company (*d*).

Transfer by personal representative.

24. Any transfer of the share or other interest of a deceased member of a company under this act, made by his personal representative, shall, notwithstanding such personal representative may not himself be a member, be of the same validity as if he had been a member at the time of the execution of the instrument of transfer (*e*).

Register of members.
[20 Vict. c. 47, §§ 16 and 18.]

25. Every company under this act shall cause to be kept in one or more books a register of its members (*f*), and there shall be entered therein the following particulars:

- (1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number: and of the amount paid or agreed to be considered as paid on the shares of each member.
- (2.) The date at which the name of any person was entered in the register as a member:
- (3.) The date at which any person ceased to be a member:

And any company acting in contravention of this section shall incur a penalty not exceeding five pounds for every day during which its default in complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorise or permit such contravention shall incur the like penalty.

26. Every company under this act, and having a capital divided into

(*a*) See pp. 667 *et seq.*

(*b*) See Table A. Nos. 8—16.

(*c*) See *ante*, p. 136.

(*d*) See *ante*, pp. 128 and 170.

(*e*) See Table A. Nos. 12—16.

(*f*) As to the inspection of the register, see § 32; and as to its rectification, see §§ 35 and 98.

As to registers generally, see *ante*, p. 142 *et seq.*

shares (*g*), shall make, once at least in every year, a list (*h*) of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars:

- (1.) The amount of the capital of the company, and the number of shares into which it is divided:
- (2.) The number of shares taken from the commencement of the company up to the date of the summary:
- (3.) The amount of calls made on each share:
- (4.) The total amount of calls received:
- (5.) The total amount of calls unpaid:
- (6.) The total amount of shares forfeited:
- (7.) The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint stock companies (*i*).

27. If any company under this act, and having a capital divided into shares, makes default in complying with the provisions of this act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

28. Every company under this act, having a capital divided into shares, that has consolidated and divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock (*k*), shall give notice to the registrar of joint-stock companies of such consolidation, division, or conversion, specifying the shares so consolidated, divided, or converted (*l*).

29. Where any company under this act, and having a capital divided into shares, has converted any portion of its capital into stock, and given notice of such conversion to the registrar, all the provisions of this act which are applicable to shares only shall cease as to so much of the capital as is converted into stock (*m*); and the register of members hereby required to be kept by the company, and the list of members to be forwarded to the registrar, shall show the amount of stock held by each member in the list instead of the amount of shares and the particulars relating to shares hereinbefore required.

30. No notice of any trust, express, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this act and registered in England or Ireland.

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Annual list of members.

[20 Vict. c. 47, § 17.]

Penalty on company, &c., not keeping a proper register.

[20 Vict. c. 47, § 18.]

Company to give notice of consolidation or of conversion of capital into stock.

[21 Vict. c. 14, § 6.]

Effect of conversion of shares into stock.

[21 Vict. c. 14, §§ 5—7.]

Entry of trusts on register.

[20 Vict. c. 47, § 19.]

(*g*) As to other companies, see §§ 45 and 174, (5).
and 46.

(*k*) Under § 12.

(*h*) See the Form E. in Sched. 2.

(*l*) See § 34.

(*i*) As to their inspection, see §§ 32

(*m*) See Table A. Nos. 23—25.

APPENDIX V.

Certificate of
shares or stock.
[20 Vict. c. 47,
§ 21.]

Inspection of
register.
[20 Vict. c. 47,
§ 23.]

Power to close
register.
[20 Vict. c. 47,
§ 24.]

Notice of in-
crease of capital
and of members
to be given to
registrar.
[20 Vict. c. 47,
§ 37.]

Remedy for im-
proper entry or
omission of entry
in register.
[20 Vict. c. 47,
§ 25, and 21
Vict. c. 14, §§
8—9.]

31. A certificate under the common seal of the company, specifying any share or shares or stock held by any member of a company, shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified (n).

32. The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned: except when closed as hereinafter mentioned, it shall during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or such less sum as the company may prescribe, for each inspection; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of sixpence for every hundred words required to be copied: if such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues, and every director and manager of the company who shall knowingly authorise or permit such refusal shall incur the like penalty; and in addition to the above penalty, as respects companies registered in England or Ireland, any judge sitting in chambers, or the vice-warden of the Stannaries, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register (o).

33. Any company under this act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, close the register of members for any time or times not exceeding in the whole thirty days in each year.

34. Where a company has a capital divided into shares, whether such shares may or may not have been converted into stock, notice of any increase in such capital beyond the registered capital, and where a company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number, shall be given to the registrar in the case of an increase of capital, within fifteen days from the date of the passing of the resolution by which such increase has been authorised, and in the case of an increase of members within fifteen days from the time at which such increase of members has been resolved on or has taken place, and the registrar shall forthwith record the amount of such increase of capital or members: if such notice is not given within the period aforesaid, the company in default shall incur a penalty not exceeding five pounds for every day during which such neglect to give notice continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

35. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company,

(n) As to the right to require this, see certificates, *ante*, p. 147.

Table A. Nos. 2 and 3. See as to these

(o) As to mandamus, see *ante*, p. 890.

or the company itself, may, as respects companies registered in England or Ireland, by motion in any of Her Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the court of session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal, in the manner directed by "The common law procedure act, 1854," shall lie (*p*).

36. Whenever any order has been made rectifying the register, in the case of a company hereby required to send a list of its members to the registrar, the court shall, by its order, direct that due notice of such rectification be given to the registrar.

Notice to registrar of rectification of register.

37. The register of members shall be *prima facie* evidence of any matters by this act directed or authorised to be inserted therein.

Register to be evidence.

[20 Vict. c. 47, § 26.]

Liability of members (q).

38. In the event of a company formed under this act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say,)

Liability of present and past members of company.

[20 Vict. c. 47, §§ 61—63.]

(1.) No past member shall be liable to contribute to the assets of the company, if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up (*r*):

(2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member:

(*p*) See also *infra*, § 98; and as to rectifying registers generally, *ante*, p. 146; and as to this section more particularly, p. 171, 1299 and 1356; and *Ward & Henry's case*, L. R. 2 Ch. App. 431.

(*q*) See further as to the liability of members, §§ 42, 48, 180, 182, 195 and 196, cl. 5 and § 200; and see § 102 respecting calls in winding up.

(*r*) See §§ 84 and 130.

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- (3.) No past member shall be liable to contribute to the assets of the company unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this act:
- (4.) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member:
- (5.) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association (s):
- (6.) Nothing in this act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract (t):
- (7.) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves (u).

[22 Vict. c. 60,
§ 17.]

PART III.

MANAGEMENT AND ADMINISTRATION OF COMPANIES AND ASSOCIATIONS
UNDER THIS ACT.*Provisions for protection of creditors.*

Registered
office of com-
pany.

[20 Vict. c. 47,
§ 28.]

Notice of situa-
tion of registered
office.

[20 Vict. c. 47,
§ 29.]

Publication of
name by a
limited com-
pany.

[20 Vict. c. 47,
§ 30.]

39. Every company under this act shall have a registered office to which all communications and notices may be addressed: If any company under this act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which business is so carried on.

40. Notice of the situation of such registered office, and of any change therein, shall be given to the registrar, and recorded by him: until such notice is given the company shall not be deemed to have complied with the provisions of this act with respect to having a registered office.

41. Every limited company under this act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertise-

(s) See §§ 90 and 134.

(t) See *ante*, p. 382 *et seq.*

(u) See § 101, and *ante*, pp. 1287 and 1400.

ments, and other official publications of such company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

APPENDIX V.

42. If any limited company under this act does not paint or affix, and keep painted or affixed, its name in manner directed by this act, it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall be liable to the like penalty; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any notice, advertisement, or other official publication of such company, or signs or authorises to be signed on behalf of such company, any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company (x).

Penalties on non-publication of name.

[20 Vict. c. 47, § 31.]

43. Every limited company under this act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge: if any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding fifty pounds: the register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorizing or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the vice-warden of the Stannaries in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register.

Register of mortgages.

44. Every limited banking company and every insurance company, and deposit, provident, or benefit society under this act shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the Form marked D. in the 1st Schedule hereto, or as near thereto as circumstances will admit, and a copy of such statement

Certain companies to publish statement entered in schedule.

[22 Vict. c. 91, § 4.]

(x) See *ante*, p. 389.

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shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on, and if default is made in compliance with the provisions of this section the company shall be liable to a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Every member and every creditor of any company mentioned in this section shall be entitled to a copy of the above-mentioned statement on payment of a sum not exceeding sixpence.

List of directors to be sent to registrar.

45. Every company under this act, and not having a capital divided into shares (*y*), shall keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and shall send to the registrar of joint-stock companies a copy of such register, and shall from time to time notify to the registrar any change that takes place in such directors or managers.

Penalty on company not keeping register of directors.

46. If any company under this act, and not having a capital divided into shares, makes default in keeping a register of its directors or managers, or in sending a copy of such register to the registrar in compliance with the foregoing rules, or in notifying to the registrar any change that takes place in such directors or managers, such delinquent company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Promissory notes and bills of exchange.

[20 Vict. c. 47, § 43.]

47. A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf or on account of the company, by any person acting under the authority of the company (*z*).

Prohibition against carrying on business with less than seven members.

[20 Vict. c. 47, § 39.]

48. If any company under this act carries on business when the number of its members is less than seven for a period of six months after the number has been so reduced, every person who is a member of such company during the time that it so carries on business after such period of six months, and is cognizant of the fact that it is so carrying on business with fewer than seven members, shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member (*a*).

Provisions for protection of members.

General meeting of company.

[20 Vict. c. 47, § 32.]

49. A general meeting of every company under this act shall be held once at the least in every year.

Power to alter regulations by special resolution.

[20 Vict. c. 47, § 33.]

50. Subject to the provisions of this act, and to the conditions contained in the memorandum of association, any company formed under this act may in general meeting from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the

(*y*) As to other companies, see § 26.

(*z*) See *ante*, p. 349 *et seq.*

As to the inspection of this register, see §§ 32 and 174 (*5*).

(*a*) See § 79.

company contained in the articles of association or in the Table marked A. in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company (*b*); and any regulation so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

51. A resolution passed by a company under this act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where, by the regulations of the company, proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month, from the date of the meeting at which such resolution was first passed. At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same. Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.

52. In default of any regulations as to voting, every member shall have one vote (*c*), and in default of any regulations as to summoning general meetings, a meeting shall be held, to be duly summoned, of which seven days' notice in writing has been served on every member, in manner in which notices are required to be served by the Table marked A. in the first schedule hereto (*d*); and in default of any regulations as to the persons to summon meetings, five members shall be competent to summon the same (*e*); and in default of any regulations as to who is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside (*f*).

53. A copy of any special resolution that is passed by any company under this act shall be printed and forwarded to the registrar of joint-stock companies, and be recorded by him. If such copy is not so forwarded within fifteen days from the date of the confirmation of the resolution, the

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Definition of special resolution.

[20 Vict. c. 47, § 34.]

Provision where no regulations as to meetings.

Registry of special resolutions.

[20 Vict. c. 47, § 35.]

(*b*) As to altering the conditions in the memorandum of association, see § 12; and as to companies existing before the passing of this Act, see §§ 176 and 196, cl. 3, 4 and 6.

See further as to what can be done by

special resolution, §§ 60, 79, 129, and Table A., Nos. 25, 26, and *ante*, p. 573.

(*c*) See Table A., No. 44.

(*d*) See Table A., Nos. 35 and 95—7.

(*e*) See Table A., No. 34.

(*f*) See Table A., Nos. 39, 40.

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Copies of special resolutions.
[20 Vict. c. 47, § 36.]

company shall incur a penalty not exceeding two pounds for every day after the expiration of such fifteen days during which such copy is omitted to be forwarded, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

54. Where articles of association have been registered, a copy of every special resolution for the time being in force shall be annexed to or embodied in every copy of the articles of association that may be issued after the passing of such resolution. Where no articles of association have been registered, a copy of any special resolution shall be forwarded in print to any member requesting the same on payment of one shilling, or such less sum as the company may direct. And if any company makes default in complying with the provisions of this section, it shall incur a penalty not exceeding one pound for each copy in respect of which such default is made; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Execution of deeds abroad.
[20 Vict. c. 47, § 42.]

55. Any company under this act may, by instrument in writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom; and every deed signed by such attorney, on behalf of the company, and under his seal, shall be binding on the company, and have the same effect as if it were under the common seal of the company (*g*).

Examination of affairs of company by inspectors.
[20 Vict. c. 47, § 48.]

56. The Board of Trade may appoint one or more competent inspectors to examine into the affairs of any company under this act, and to report thereon, in such manner as the Board may direct, upon the application following (that is to say):

- (1.) In the case of a banking company that has a capital divided into shares, upon the application of members holding not less than one-third part of the whole shares of the company for the time being issued:
- (2.) In the case of any other company that has a capital divided into shares, upon the application of members holding not less than one-fifth part of the whole shares of the company for the time being issued:
- (3.) In the case of any company not having a capital divided into shares, upon the application of members being in number not less than one-fifth of the whole number of persons for the time being entered on the register of the company as members.

Application for inspection to be supported by evidence.

57. The application shall be supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same. The Board of Trade may also require the applicants to give security for payment of the costs of the inquiry before appointing any inspector or inspectors.

Inspection of books.
[20 Vict. c. 47, § 49.]

58. It shall be the duty of all officers and agents of the company to produce for the examination of the inspectors all books and documents in their custody or power. Any inspector may examine upon oath the

(*g*) See also 27 & 28 Vict. c. 19.

officers and agents of the company in relation to its business, and may administer such oath accordingly. If any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, he shall incur a penalty not exceeding five pounds in respect of each offence.

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59. Upon the conclusion of the examination, the inspectors shall report their opinion to the Board of Trade. Such report shall be written or printed, as the Board of Trade directs. A copy shall be forwarded by the Board of Trade to the registered office of the company, and a further copy shall, at the request of the members upon whose application the inspection was made, be delivered to them or to any one or more of them. All expenses of and incidental to any such examination as aforesaid shall be defrayed by the members upon whose application the inspectors were appointed, unless the Board of Trade shall direct the same to be paid out of the assets of the company, which it is hereby authorised to do.

Result of examination how dealt with.

[20 Vict. c. 47, § 50.]

60. Any company under this act may, by special resolution (*h*), appoint inspectors for the purpose of examining into the affairs of the company. The inspectors so appointed shall have the same powers and perform the same duties as inspectors appointed by the Board of Trade, with this exception, that, instead of making their report to the Board of Trade, they shall make the same in such manner and to such persons as the company in general meeting directs; and the officers and agents of the company shall incur the same penalties in case of any refusal to produce any book or document hereby required to be produced to such inspectors, or to answer any question, as they would have incurred if such inspector had been appointed by the Board of Trade.

Power of company to appoint inspectors.

[20 Vict. c. 47, § 51.]

61. A copy of the report of any inspectors appointed under this act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding, as evidence of the opinion of the inspectors in relation to any matter contained in such report.

Report of inspectors to be evidence.

[20 Vict. c. 47, § 52.]

Notices.

62. Any summons, notice, order, or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company at their registered office (*i*).

Service of notices on company.

[20 Vict. c. 47, § 53.]

63. Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and, in proving service of such document, it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post-office (*k*).

Rules as to notices by letter.

[20 Vict. c. 47, § 54.]

64. Any summons, notice, order, or proceeding requiring authentication by the company, may be signed by any director, secretary, or other authorised officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print.

Authentication of notices of company.

[20 Vict. c. 47, § 55.]

(*h*) See § 51.

(*i*) See Rules 63 and 64.

(*k*) See Rules 63 and 64.

Legal proceedings.

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Recovery of penalties.

[20 Vict. c. 47,
§ 56.]
11 & 12 Vict.
c. 43.

17 & 18 Vict.
c. 104.

14 & 15 Vict.
c. 93.

Application of penalties.

[20 Vict. c. 47,
§ 57.]

Evidence of proceedings at meetings.

[20 Vict. c. 47,
§ 40.]

Jurisdiction of vice-warden of Stannaries.

65. All offences under this act made punishable by any penalty may be prosecuted summarily before two or more justices, as to England, in manner directed by an act passed in the session holden in the eleventh and twelfth years of the reign of her Majesty Queen Victoria, chapter forty-three, intituled "An act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders," or any act amending the same; and as to Scotland, before two or more justices or the sheriff of the county, in manner directed by the act passed in the session of Parliament holden in the seventeenth and eighteenth years of the reign of her Majesty Queen Victoria, chapter one hundred and four, intituled "An act to amend and consolidate the acts relating to Merchant shipping," or any act amending the same, as regards offences in Scotland against that act, not being offences by that act described as felonies or misdemeanors; and as to Ireland, in manner directed by the act passed in the session holden in the fourteenth and fifteenth years of the reign of her Majesty Queen Victoria, chapter ninety-three, intituled "An act to consolidate and amend the acts regulating the proceedings of petty sessions and the duties of justices of the peace out of quarter sessions in Ireland," or any act amending the same.

66. The justices or sheriff imposing any penalty under this act may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person upon whose information or at whose suit such penalty has been recovered; and, subject to such direction, all penalties shall be paid into the receipt of her Majesty's exchequer in such manner as the Treasury may direct, and shall be carried to and form part of the Consolidated Fund of the United Kingdom.

67. Every company under this act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat, or proceedings had, to have been duly passed and had, and all appointments of directors, managers, or liquidators shall be deemed to be valid, and all acts done by such directors, managers, or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications (*l*).

68. In the case of companies under this act, and engaged in working mines within and subject to the jurisdiction of the Stannaries, the court

(*l*) See as to meetings and the minutes of their proceedings, *ante*, p. 565, and as to the last part of this section, *ante*, pp. 558 and 1413.

of the vice-warden of the Stannaries shall have and exercise the like jurisdiction and powers, as well on the common law as on the equity side thereof, which it now possesses by custom, usage, or statute in the case of unincorporated companies, but only so far as such jurisdiction or powers are consistent with the provisions of this act and with the constitution of companies as prescribed or required by this act; and for the purpose of giving fuller effect to such jurisdiction in all actions, suits, or legal proceedings instituted in the said court, in causes and matters whereof the court has cognisance, all process issuing out of the same, and all orders, rules, demands, notices, warrants, and summonses required or authorised by the practice of the court to be served on any company, whether registered or not registered, or any member or contributory thereof, or any officer, agent, director, manager, or servant thereof, may be served in any part of England without any special order of the vice-warden for that purpose, or by such special order may be served in any part of the United Kingdom of Great Britain and Ireland, or in the adjacent islands, parcel of the dominions of the Crown, on such terms and conditions as the court shall think fit; and all decrees, orders, and judgments of the said court made or pronounced in such causes or matters may be enforced in the same manner in which decrees, orders, and judgments of the court may now by law be enforced, whether within or beyond the local limits of the Stannaries; and the seal of the said court, and the signature of the registrar thereof, shall be judicially noticed by all other courts and judges in England, and shall require no other proof than the production thereof: the registrar of the said court, or the assistant-registrar, in making sales under any decree or order of the court shall be entitled to the same privilege of selling by auction or competition without a license, and without being liable to duty, as a judge of the Court of Chancery is entitled to in pursuance of the acts in that behalf.

69. Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given (*m*). Provision as to costs in actions brought by certain limited companies. [21 Vict. c. 14, § 24.]

70. In any action or suit brought by the company against any member to recover any call or other monies due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other monies due whereby an action or suit hath accrued to the company (*n*). Declaration in action against members.

Alteration of forms.

71. The forms set forth in the second schedule hereto, or forms as near thereto as circumstances admit, shall be used in all matters to which such forms refer; the Board of Trade may from time to time make such alterations in the tables and forms contained in the first schedule hereto, Board of Trade may alter forms in schedule. [20 Vict. c. 47, § 58, and 21

(*m*) See *ante*, p. 509.

(*n*) See *ante*, p. 885.

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Vict. c. 14,
§ 22.]

so that it does not increase the amount of fees payable to the registrar in the said schedule mentioned, and in the forms in the second schedule, or make such additions to the last-mentioned forms, as it deems requisite: any such table or form, when altered, shall be published in the "London Gazette," and upon such publication being made, such table or form shall have the same force as if it were included in the schedule to this act, but no alteration made by the Board of Trade in the table marked A. contained in the first schedule, shall affect any company registered prior to the date of such alteration, or repeal, as respects such company, any portion of such table.

Arbitrations.

Power for com-
panies to refer
matters to arbi-
tration.

72. Any company under this act may from time to time, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with "The Railway companies arbitration act, 1859" (*o*), any existing or future difference, question, or other matter whatsoever in dispute between itself and any other company or person, and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies.

Provisions of 22
& 23 Vict. c.
59, to apply.

73. All the provisions of "The Railway companies arbitration act, 1859," shall be deemed to apply to arbitrations between companies and persons in pursuance of this act: and in the construction of such provisions "the companies" shall be deemed to include companies authorised by this act to refer disputes to arbitration.

PART IV.

WINDING UP OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT (*p*).*Preliminary.*

Meaning of con-
tributory.

[20 Vict. c. 47,
§ 65.]

74. The term "contributory" shall mean every person liable to contribute to the assets of a company under this act, in the event of the same being wound up (*q*): it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory (*r*).

Nature of lia-
bility of contri-
butory.

[21 Vict. c. 14,
§ 13.]

75. The liability of any person to contribute to the assets of a company under this act in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability com-

(*o*) 22 & 23 Vict. c. 59.

(*p*) See as to companies registered under the acts of 1856—8, *infra*, §§ 176, 177; and as to companies registered under this act, but not formed under it or the last mentioned acts, *infra*, §§ 196—198; and

as to companies not registered at all, *infra*, §§ 199—204.

(*q*) See §§ 38 and 76—78.

(*r*) See Rules 58 and 60 to 62, and *ante*, p. 1222.

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menced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made (*s*).

76. If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly (*t*).

Contributories in case of death.

[20 Vict. c. 47, § 65.]

77. If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding-up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any monies due from such bankrupt in respect of his liability to contribute to the assets of the company being wound up (*u*); and for the purposes of this section any person who may have taken the benefit of any act for the relief of insolvent debtors (*x*) before the eleventh day of October one thousand eight hundred and sixty-one shall be deemed to have become bankrupt.

Contributories in case of bankruptcy.

78. If any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly.

Contributories in case of marriage.

Winding up by court.

79. A company under this act (*y*) may be wound up by the court as hereinafter defined, under the following circumstances; (that is to say,)

Circumstances under which company may be wound up by court.

- (1.) Whenever the company has passed a special resolution requiring the company to be wound up by the court:
- (2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year:
- (3.) Whenever the members are reduced in number to less than seven (*z*):
- (4.) Whenever the company is unable to pay its debts:
- (5.) Whenever the court is of opinion that it is just and equitable that the company should be wound up (*a*).

[20 Vict. c. 47, § 67.]

(*s*) See *ante*, pp. 1161, 1198.

(*t*) See also § 105; and as to putting them on the list, see § 99, and *ante*, p. 1316.

(*u*) See § 75. and *ante*, pp. 1161, 1198, and as to putting bankrupts, &c., on the list, p. 1318.

(*x*) Viz. 1 & 2 Vict. c. 110; 5 & 6

Vict. c. 116; 7 & 8 Vict. c. 96, all repealed by 24 & 25 Vict. c. 134.

(*y*) See § 199 (3), as to unregistered companies.

(*z*) See § 48.

(*a*) See as to the circumstances under which a company will be ordered to be wound up, pp. 1223—1241.

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Company when
deemed unable
to pay its debts.
[20 Vict. c. 47,
§ 68.]

Definition of
"the court."
[20 Vict. c. 47,
§§ 60 and 74,
and 20 & 21
Vict. c. 78,
§ 12.]

Application for
winding up to be
made by peti-
tion.

80. A company under this act (*b*) shall be deemed to be unable to pay its debts,

- (1.) Whenever a creditor by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor :
- (2.) Whenever, in England and Ireland, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor, at law or in equity, in any proceeding instituted by such creditor against the company, is returned unsatisfied in whole or in part :
- (3.) Whenever, in Scotland, the induciæ of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made :
- (4.) Whenever it is proved to the satisfaction of the court that the company is unable to pay its debts (*c*).

81. The expression "the court," as used in this part of this act, shall mean the following authorities; (that is to say,) (*d*)

In the case of a company engaged in working any mine within and subject to the jurisdiction of the Stannaries,—the court of the vice-warden of the Stannaries, unless the vice-warden certifies that in his opinion the company would be more advantageously wound up in the High Court of Chancery, in which case "the court" shall mean the High Court of Chancery :

In the case of a company registered in England that is not engaged in working any such mine as aforesaid,—the High Court of Chancery :

In the case of a company registered in Ireland, the Court of Chancery in Ireland :

In all cases of companies registered in Scotland, the Court of Session in either division thereof :

Provided that where the Court of Chancery in England or Ireland makes an order for winding up a company under this act, it may, if it thinks fit, direct all subsequent proceedings for winding up the same to be had in the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate ; and thereupon such last-mentioned Court of Bankruptcy shall, for the purposes of winding up the company, be deemed to be "the court" within the meaning of the act, and shall have for the purposes of such winding up all the powers of the High Court of Chancery, or the Court of Chancery in Ireland, as the case may require.

82. Any application to the court for the winding up of a company under this act shall be by petition (*e*) ; it may be presented by the company, or

(*b*) See, as to unregistered companies, § 199 (4).

(*c*) See *ante* 1227—9.

(*d*) See *ante*, p. 1215, and as to Industrial and provident Societies, 25 & 26 Vict. c. 87, § 17, *ante*, p. 1430.

(*e*) As to the petition, see *ante*, p. 1241, and Rules 1 to 5, and Forms 1 and 2, in the 3rd Schedule thereto. As to the order to wind up, see Rules 6 and 7, and Forms 3—5, in the 3rd Schedule thereto.

by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favour of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.

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[20 Vict. c. 47,
§ 69.]

83. Any judge of the High Court of Chancery may do in chambers any act which the court is hereby authorised to do; and the vice-warden of the Stannaries may direct that a petition for winding up a company be heard by him at such time and at such place within the jurisdiction of the Stannaries, or within or near to the place where the registered office of the company is situated, as he may deem to be convenient to the parties concerned, or (with the consent of the parties concerned) at any place in England; and all orders made thereupon shall have the same force and effect as if they had been made by the vice-warden sitting at Truro or elsewhere within the jurisdiction of the court, and all parties and persons summoned to attend at the hearing of any such petition shall be compellable to give their attendance before the vice-warden by like process and in like manner as at the hearing of any cause or matter at the usual sitting of the said court; and the registrar of the court may, subject to exception or appeal to the vice-warden as heretofore used, do and exercise such and the like acts and powers in the matter of winding up as he is now used to do and exercise in a suit on the equity side of the said court.

Power of court.

84. A winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up (*f*).

Commencement
of winding up by
court.
[20 Vict. c. 47,
§ 64.]

85. The court may, at any time after the presentation of a petition for winding up a company under this act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the court thinks fit (*g*); the court may also at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company (*h*).

Court may grant
injunction.
[20 Vict. c. 47,
§ 84.]

86. Upon hearing the petition the court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally, and may make any interim order, or any other order that it deems just (*i*).

Course to be pur-
sued by court on
hearing petition.
[20 Vict. c. 47.
§§ 70—72.]

87. When an order has been made for winding up a company under this act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court, and subject to such terms as the court may impose (*j*).

Actions and suits
to be stayed after
order for wind-
ing up.
[22 Vict. c. 60,
§ 6.]

(*f*) See *ante*, p. 1250, §§ 114, 153, 163, 164.

ante, p. 1269, and Rules 15 and 59.

(*g*) See *ante*, p. 1255 and § 197; and as to unregistered companies, §§ 201 and 204.

(*i*) See *ante*, pp. 1227 *et seq.*, and as to costs, p. 1244.

(*j*) See also §§ 163, 198; and as to unregistered companies, § 202.

(*h*) See, as to provisional liquidators,

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Copy of order to be forwarded to registrar.

[20 Vict. c. 47, § 73.]

Power of court to stay proceedings.

[20 Vict. c. 47, § 85.]

Effect of order on share capital of company limited by guarantee.

Court may have regard to wishes of creditors or contributories.

88. When an order has been made for winding up a company under this act, a copy of such order shall forthwith be forwarded by the company to the registrar of joint-stock companies, who shall make a minute thereof in his books relating to the company.

89. The court may at any time after an order has been made for winding up a company, upon the application by motion of any creditor or contributory of the company, and upon proof to the satisfaction of the court that all proceedings in relation to such winding up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit (*k*).

90. When an order has been made for winding up a company limited by guarantee and having a capital divided into shares, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a debt (in England and Ireland of the nature of a specialty) due to the company from each member to the extent of any sums that may be unpaid on any shares held by him and payable at such time as may be appointed by the court (*l*).

91. The court may, as to all matters relating to the winding up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court: in the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company (*m*).

Official liquidators (n).

Appointment of official liquidator.

[20 Vict. c. 47, § 88.]

92. For the purpose of conducting the proceedings in winding up a company, and assisting the court therein, there may be appointed a person or persons to be called an official liquidator or official liquidators; and the court having jurisdiction may appoint such person or persons, either provisionally or otherwise, as it thinks fit, to the office of official liquidator or official liquidators; in all cases if more persons than one are appointed to the office of official liquidator, the court shall declare whether any act hereby required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons. The court may also determine whether any and what security is to be given by any official liquidator on his appointment; if no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed to be in the custody of the court (*o*).

Resignations, removals, filling up vacancies, and compensation.

[20 Vict. c. 47, § 92.]

93. Any official liquidator may resign or be removed by the court on due cause shown: and any vacancy in the office of an official liquidator appointed by the court shall be filled by the court (*p*): there shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the court may direct (*q*), and if more liquidators

(*k*) See *ante*, p. 1248.

(*l*) See also § 134.

(*m*) See also § 149 and Rules 45—47.

(*n*) See *ante*, pp. 1271 *et seq.*

(*o*) See also Rules 8—19.

(*p*) See Rule 16.

(*q*) See Rule 18.

than one are appointed such remuneration shall be distributed amongst them in such proportions as the court directs.

94. The official liquidator or liquidators shall be described by the style of the official liquidator or official liquidators of the particular company in respect of which he is or they are appointed, and not by his or their individual name or names (*r*): he or they shall take into his or their custody, or under his or their control, all the property, effects, and things in actions to which the company is or appears to be entitled, and shall perform such duties in reference to the winding up of the company as may be imposed by the court (*s*).

95. The official liquidator shall have power, with the sanction of the court (*t*), to do the following things: (*u*)

- (1.) To bring or defend any action, suit, or prosecution, or other legal proceedings, civil or criminal, in the name and on behalf of the company (*x*):
- (2.) To carry on the business of the company, so far as may be necessary for the beneficial winding up of the same:
- (3.) To sell the real and personal and heritable and movable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels (*y*):
- (4.) To do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal:
- (5.) To prove, rank, claim, and draw a dividend, in the matter of the bankruptcy or insolvency or sequestration of any contributory, for any balance against the estate of such contributory, and to take and receive dividends in respect of such balance, in the matter of bankruptcy or insolvency or sequestration, as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors:
- (6.) To draw, accept, make, and endorse any bill of exchange or promissory note in the name and on behalf of the company, also to raise upon the security of the assets of the company from time to time any requisite sum or sums of money; and the drawing, accepting, making, or endorsing of every such bill of exchange or promissory note as aforesaid on behalf of the company shall have the same effect with respect to the liability of such company as if such bill or note had been drawn, accepted, made, or endorsed by or on behalf of such company in the course of carrying on the business thereof:
- (7.) To take out, if necessary, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act that may be necessary for obtaining payment of any monies due from a contributory or from his estate, and which act cannot be conveniently done in the name of the

APPENDIX V.

Style and duties of official liquidator.

[20 Vict. c. 47, § 89.]

Powers of official liquidator.

[20 Vict. c. 47, § 90.]

[12 & 13 Vict. c. 108, § 8.]

(*r*) See *ante*, p. 1274.

(*s*) See § 203 as to unregistered companies.

(*t*) See Rules 48—50.

(*u*) See *ante*, pp. 1278 *et seq.*

(*x*) See *ante*, p. 1275, and § 203 as to unregistered companies.

(*y*) See as to sales, Rule 32, and *ante*, pp. 1275 and 1277.

APPENDIX V.

Discretion of
official liqui-
dator.

[22 Vict. c. 60,
§ 9.]

Appointment of
solicitor to official
liquidator.

[20 Vict. c. 47,
§ 91.]

Collection and
application of
assets.

[20 Vict. c. 47,
§ 75.]

Provision as to
representative
contributories.

Power of court to
require delivery
of property.

[11 & 12 Vict.
c. 45, § 66.]

Power of court
to order payment
of debts by con-
tributory.

[11 & 12 Vict.
c. 45, § 66; 21
& 22 Vict. c. 60,
§ 17.]

company; and in all cases where he takes out letters of administration, or otherwise uses his official name for obtaining payment of any monies due from a contributory, such monies shall, for the purpose of enabling him to take out such letters or recover such monies, be deemed to be due to the official liquidator himself:

- (8.) To do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets (z).

96. The court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the court, and where an official liquidator is provisionally appointed may limit and restrict his powers by the order appointing him.

97. The official liquidator may, with the sanction of the court, appoint a solicitor or law agent to assist him in the performance of his duties (a).

Ordinary powers of court (b).

98. As soon as may be after making an order for winding up the company, the court shall settle a list of contributories (c), with power to rectify the register of members in all cases where such rectification is required in pursuance of this act (d), and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

99. In settling the list of contributories the court shall distinguish between persons who are contributories in their own right, and persons who are contributories as being representatives of or being liable to the debts of others; it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, nevertheless such heirs or devisees may be added as and when the court thinks fit (e).

100. The court may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company, to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the court directs, to or into the hands of the official liquidator (f), any sum or balance, books, papers, estate or effects which happen to be in his hands for the time being, and to which the company is *primâ facie* entitled (g).

101. The court may, at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any monies due from him or from the estate of the person whom he represents to the company, exclusive of any monies which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the

(z) See further §§ 159—162.

(a) See Rule 68.

(b) See *ante*, pp. 1261 *et seq.*

(c) See Rules 29—31, and the Forms 24 to 32 in the 3rd Sched. to the rules; and see *ante*, pp. 1289 *et seq.*

(d) See § 35, and *ante*, pp. 171, 1299,

1356.

(e) See § 76, and Rules 29—31; and see *ante*, p. 1316.

(f) See § 103.

(g) See Form 13 in the 3rd Schedule to the rules, and *ante*, pp. 1265—6.

court in pursuance of this part of this act (*h*); and it may, in making such order, when the company is not limited, allow to such contributory by way of set-off any monies due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any monies due to him as a member of the company in respect of any dividend or profit:

Provided that when all the creditors of any company, whether limited or unlimited, are paid in full, any monies due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls (*i*).

102. The court may, at any time after making an order for winding up a company, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and it may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same (*k*).

103. The court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the Bank of England or any branch thereof to the account of the official liquidator instead of to the official liquidator, and such order may be enforced in the same manner as if it had directed payment to the official liquidator (*l*).

104. All monies, bills, notes, and other securities paid and delivered into the Bank of England or any branch thereof in the event of a company being wound up by the court, shall be subject to such order and regulation for the keeping of the account of such monies and other effects, and for the payment and delivery in, or investment and payment and delivery out of the same as the court may direct (*m*).

105. If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal and real estates of such deceased contributory, or either of such estates, and of compelling payment thereout of the monies due (*n*).

106. Any order made by the court in pursuance of this act upon any contributory shall, subject to the provisions herein contained for appealing against such order, be conclusive evidence that the monies, if any, thereby appearing to be due or ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever, with the exception of proceedings taken against the real estate of any deceased contributory, in which case such order shall only be *prima facie* evidence

Power of court to make calls.

[20 Vict. c. 47, § 82.]

Power of court to order payment into bank.

[20 Vict. c. 47, § 83.]

Regulation of account with court.

Provision in case of representative contributory not paying monies ordered.

Order conclusive evidence.

[11 & 12 Vict. c. 45, § 89.]

(*h*) See also § 165, and Rule 35, and Form 39 in the 3rd Schedule to the rules.

(*i*) See further as to set off, § 38, cl. 7, and *ante*, pp. 1287 and 1400.

(*k*) See further, as to calls, Rules 33

—35, and *ante*, pp. 1390 *et seq.*

(*l*) See Rules 11, 32, and 36—41, and *ante*, p. 1266.

(*m*) See Rules 11, 32, and 36—44.

(*n*) See § 76.

APPENDIX V.

Court may exclude creditors not proving within certain time.
[20 Vict. c. 47, § 84.]

Proceedings in the court of the vice-warden of the Stannaries on proof of debts.

Court to adjust rights of contributories.
[20 Vict. c. 47, § 86.]

Court to order costs.
[20 Vict. c. 47, § 87.]

Dissolution of company.
[20 Vict. c. 47, § 93.]

Registrar to make minute of dissolution of company.
[20 Vict. c. 47, § 94.]

for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made.

107. The court may fix a certain day or certain days on or within which creditors of the company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved (*o*).

108. If in the course of proving the debts and claims of creditors in the court of the vice-warden of the Stannaries any debt or claim is disputed by the official liquidator or by any creditor or contributory, or appears to the court to be open to question, the court shall have power, subject to appeal as hereinafter provided, to adjudicate upon it, and for that purpose the said court shall have and exercise all needful powers of inquiry touching the same by affidavit or by oral examination of witnesses or of parties, whether voluntarily offering themselves for examination or summoned to attend by compulsory process of the court, or to produce documents before the court; and the court shall also have power, incidentally, to decide on the validity and extent of any lien or charge claimed by any creditor on any property of the company in respect of such debt, and to make declarations of right, binding on all persons interested; and for the more satisfactory determination of any question of fact, or mixed question of law and fact arising on such inquiry, the vice-warden shall have power, if he thinks fit, to direct and settle any action or issue to be tried either on the common law side of his court, or by a common or special jury, before the justices of assize in and for the counties of Cornwall or Devon, or at any sitting of one of the superior courts in London or Middlesex, which action or issue shall accordingly be tried in due course of law, and without other or further consent of parties; and the finding of the jury in such action or issues shall be conclusive of the facts found, unless the judge who tried it makes known to the vice-warden that he was not satisfied with the finding, or unless it appears to the vice-warden that, in consequence of miscarriage, accident, or the subsequent discovery of fresh material evidence, such finding ought not to be conclusive.

109. The court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto (*p*).

110. The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company in such order or priority as the court thinks just (*q*).

111. When the affairs of the company have been completely wound up, the court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly (*r*).

112. Any order so made shall be reported by the official liquidator to the registrar, who shall make a minute accordingly in his books of the dissolution of such company.

(*o*) See Rules 20—28, and *ante*, p. 1279.

(*p*) See also § 165, and *ante*, pp. 1396 and 1408.

(*q*) See as to costs of winding up, *ante*, pp. 1401 *et seq.*

(*r*) See Rules 65—67, and *ante*, p. 1408.

113. If the official liquidator makes default in reporting to the registrar, in the case of a company being wound up by the court, the order that the company be dissolved, he shall be liable to a penalty not exceeding five pounds for every day during which he is so in default.

APPENDIX V.

Penalty on not reporting dissolution of company.

[21 Vict. c. 14, § 20.]

114. Any petition for winding up a company by the court under this act shall constitute a *lis pendens* (s) within the terms of the act passed in the session holden in the second and third years of the reign of her present Majesty, chapter eleven, and intituled, "An act for the better protection of purchasers against judgments, crown debts, *lis pendens*, and fiats in bankruptcy," provided the same is duly registered in manner required by such act concerning suits in equity.

Petition to be *lis pendens*.

[11 & 12 Vict. c. 45, § 125.]

Extraordinary powers of court (t).

115. The court may, after it has made an order for winding up the company, summon (u) before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, having no lawful impediment (made known to the court at the time of its sitting, and allowed by it), the court may cause such person to be apprehended, and brought before the court for examination; nevertheless, in cases where any person claims any lien on papers, deeds, or writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding up to determine all questions relating to such lien.

Power of court to summon persons before it suspected of having property of company.

[20 Vict. c. 47, § 77.]

116. If, after an order for winding up in the court of the vice-warden of the Stannaries, it appears that any person claims property in, or any lien, legal or equitable, upon any of the machinery, materials, ores, or effects on the mine or on premises occupied by the company in connection with the mine, or to which the company was, at the time of the order, *prima facie* entitled, it shall be lawful for the vice-warden or the registrar to adjudicate upon such claim on interpleader in the manner provided by section eleven of the act passed in the eighteenth year of the reign of her present Majesty, chapter thirty-two; and any action or issue directed upon such interpleader may, if the vice-warden think fit, be tried in his court or at the assizes or the sittings in London or Middlesex, before a judge of one of the superior courts, in the manner and on the terms and conditions hereinbefore provided in the case of disputed debts and claims of creditors.

Special provisions as to court of vice-warden of the Stannaries.

117. The court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or

Examination of parties by Court.
[20 Vict. c. 47, § 78.]

(s) See § 84, and *ante*, p. 1251.

(u) See Form 54 in the 3rd Schedule

(t) See also §§ 165—168, and *ante*, pp. 1263 *et seq.*

to the rules. See also § 165, and *ante*, p. 1264.

APPENDIX V.

Power to arrest contributory about to abscond, or to remove or conceal any of his property.
[21 Vict. c. 14, § 11.]

Powers of court cumulative.

Power to enforce orders.
[20 Vict. c. 47, § 60.]

Power to order contributories in Scotland to pay calls.
[22 Vict. c. 60, § 5.]

Order made in England to be enforced in Ireland and Scotland.
[22 Vict. c. 60, § 12.]

effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same (x).

118. The court may, at any time before or after it has made an order for winding up a company, upon proof being given that there is probable cause for believing that any contributory (y), to such company is about to quit the United Kingdom, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, monies, securities for monies, goods, and chattels to be seized, and him and them to be safely kept until such time as the court may order (z).

119. Any powers by this act conferred on the court shall be deemed to be in addition to and not in restriction of any other powers subsisting either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company for the recovery of any call or other sums due from such contributory, or debtor, or his estate, and such proceedings may be instituted accordingly.

Enforcement of and appeal from orders.

120. All orders made by the Court of Chancery in England or Ireland under this act may be enforced in the same manner in which orders of such Court of Chancery made in any suit pending therein may be enforced, and for the purposes of this part of this act the court of the vice-warden of the Stannaries shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it as the Court of Chancery in England has in relation to matters within the jurisdiction of such court, and for the last-mentioned purposes the jurisdiction of the vice-warden of the Stannaries shall be deemed to be co-extensive in local limits with the jurisdiction of the Court of Chancery in England (a).

121. Where an order, interlocutor, or decree has been made in Scotland for winding up a company by the court, it shall be competent to the court in Scotland during session, and to the lord ordinary on the bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively and of the date when the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date till payment, at the rate of five pounds per centum per annum, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest; and such decree may be extracted immediately, and no suspension thereof shall be competent, except on caution or consignation, unless with special leave of the court or lord ordinary.

122. Any order made by the court in England for or in the course of the winding up of a company under this act shall be enforced in Scotland and Ireland in the courts that would respectively have had jurisdiction in respect of such company if the registered office of the company had been

(x) See *ante*, p. 1264.

(z) See *ante*, p. 1265.

(y) Or alleged contributory. See § 74.

(a) See *ante*, p. 1268.

APPENDIX V.

situate in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the courts that are hereby required to enforce the same; and in like manner orders, interlocutors, and decrees made by the court in Scotland for or in the course of the winding up of a company shall be enforced in England and Ireland, and orders made by the court in Ireland for or in the course of winding up a company shall be enforced in England and Scotland by the courts which would respectively have had jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the court required to enforce the same in the case of a company within its own jurisdiction.

123. Where any order, interlocutor, or decree made by one court is required to be enforced by another court, as hereinbefore provided, an office copy of the order, interlocutor, or decree so made shall be produced to the proper officer of the court required to enforce the same, and the production of such office copy shall be sufficient evidence of such order, interlocutor, or decree having been made, and thereupon such last-mentioned court shall take such steps in the matter as may be requisite for enforcing such order, interlocutor, or decree in the same manner as if it were the order, interlocutor, or decree of the court enforcing the same.

Mode of dealing with orders to be enforced by other courts.

[22 Vict. c. 60, § 13.]

124. Rehearings of and appeals from any order or decision made or given in the matter of the winding up of a company by any court having jurisdiction under this act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction; subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made in manner in which notices of appeal are ordinarily given according to the practice of the court appealed from, unless such time is extended by the court of appeal (*b*), provided that it shall be lawful for the lord warden of the Stannaries, by a special or general order, to remit at once any appeal allowed and regularly lodged with him against any order or decision of the vice-warden made in the matter of a winding up to the court of appeal in chancery, which court shall thereupon hear and determine such appeal, and have power to require all such certificates of the vice-warden, records of proceedings below, documents, and papers as the lord warden would or might have required upon the hearing of such appeal, and to exercise all other the jurisdiction and powers of the lord warden specified in the act of Parliament passed in the eighteenth year of the reign of her present Majesty, chapter thirty-two, and any order so made by the court of appeal in chancery shall be final, without any further appeal.

Appeals from orders.

[11 & 12 Vict. c. 45, §§ 101—102, 12 & 13 Vict. c. 108, § 33.]

125. In all proceedings under this part of this act, all courts, judges, and persons judicially acting, and all other officers, judicial or ministerial, of any court, or employed in enforcing the process of any court, shall take judicial notice of the signature of any officer of the Courts of Chancery or Bankruptcy in England or in Ireland, or of the Court of Session in Scotland, or of the registrar of the court of the vice-warden of the Stannaries,

Judicial notice to be taken of signature of officers.

[11 & 12 Vict. c. 45, § 111.]

(b) See *ante*, pp. 1247, 1268.

APPENDIX V.

Special commis-
sioners for receiv-
ing evidence.

[20 Vict. c. 47,
§ 101.]

Court may order
the examination
of persons in
Scotland.

[12 & 13 Vict.
c. 108, § 21.]

and also of the official seal or stamp of the several offices of the Courts of Chancery or Bankruptcy in England or Ireland, or of the Court of Session in Scotland, or of the court of the vice-warden of the Stannaries, when such seal or stamp is appended to or impressed on any document made, issued, or signed under the provisions of this part of the act, or any official copy thereof.

126. The commissioners of the Court of Bankruptcy, and the judges of the county courts in England, who sit at places more than twenty miles from the General Post Office, and the commissioners of bankrupt and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, shall be commissioners for the purpose of taking evidence under this act in cases where any company is wound up in any part of the United Kingdom, and it shall be lawful for the court to refer the whole or any part of the examination of any witnesses under this act to any person hereby appointed commissioner, although such commissioner is out of the jurisdiction of the court that made the order or decree for winding up the company; and every such commissioner shall, in addition to any power of summoning and examining witnesses, and requiring the production or delivery of documents, and certifying or punishing defaults by witnesses, which he might lawfully exercise as a commissioner of the Court of Bankruptcy, judge of a county court, commissioner of bankrupt, assistant barrister, or recorder, or as a sheriff of a county, have in the matter so referred to him all the same powers of summoning and examining witnesses, and requiring the production or delivery of documents, and punishing defaults by witnesses, and allowing costs and charges and expenses to witnesses, as the court which made the order for winding up the company has; and the examination so taken shall be returned or reported to such last-mentioned court in such manner as it directs.

127. The court may direct the examination in Scotland, of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the estate, dealings, or affairs of any company in the course of being wound up, or in regard to the estate, dealings, or affairs of any person being a contributory of the company, so far as the company may be interested therein by reason of his being such contributory, and the order or commission to take such examination shall be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time, and the sheriff shall summon such person to appear before him at a time and place to be specified in the summons for examination upon oath as a witness or as a haver, and to produce any books, papers, deeds, or documents called for which may be in his possession or power, and the sheriff may take such examination either orally or upon written interrogatories, and shall report the same in writing in the usual form to the court, and shall transmit with such report the books, papers, deeds, or documents produced, if the originals thereof are required and specified by the order, or otherwise such copies thereof or extracts therefrom, authenticated by the sheriff, as may be necessary; and in case any person so summoned fails to appear at the time and place specified, or appearing refuses to be examined, or to make the production required, the sheriff shall proceed against such person as a witness or haver duly cited, and failing to appear or refusing to give evidence or make production may be proceeded against by the law of Scotland: and the sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such

and the like allowances as sheriffs when acting as commissioners under appointment from the Court of Session, and as witnesses and havers are entitled to in the like cases according to the law and practice of Scotland; if any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required to be made, or on any other ground whatever, the sheriff may, if he thinks fit, report such objection to the court, and suspend the examination of such witness until such objection has been disposed of by the court.

128. Any affidavit, affirmation, or declaration required to be sworn or made, under the provisions or for the purposes of this part of this act, may be lawfully sworn or made in Great Britain or Ireland, or in any colony, island, plantation, or place under the dominion of her Majesty in foreign parts, before any court, judge, or person lawfully authorised to take and receive affidavits, affirmations, or declarations; or before any of her Majesty's consuls or vice-consuls, in any foreign parts out of her Majesty's dominions; and all courts, judges, justices, commissioners, and persons acting judicially shall take judicial notice of the seal or stamp or signature (as the case may be) of any such court, judge, person, consul, or vice-consul attached, appended, or subscribed to any such affidavit, affirmation, or declaration, or to any other document to be used for the purposes of this part of this act.

Affidavits, &c., may be sworn in Ireland, Scotland, or the colonies before any competent court or person. [12 & 13 Vict. c. 108, § 24.]

Voluntary winding up of company (c).

129. A company under this act may be wound up voluntarily,

- (1.) Whenever the period (if any) fixed for the duration of the company by the articles of association expires, or whenever the event (if any) occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily:
- (2.) Whenever the company has passed a special resolution requiring the company to be wound up voluntarily (*d*):
- (3.) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same (*e*).

Circumstances under which company may be wound up voluntarily. [20 Vict. c. 47, § 102.]

For the purposes of this act, any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution, as hereinbefore defined (*f*).

130. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution authorising such winding up (*g*).

Commencement of voluntary winding up. [20 Vict. c. 47, § 64.]

131. Whenever a company is wound up voluntarily, the company shall, from the date of the commencement of such winding up, cease to carry on its business, except in so far as may be required for the beneficial winding up thereof; and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the

Effect of voluntary winding up on status of company. [20 Vict. c. 47, § 104.]

(c) See *ante*, pp. 1409 *et seq.*

(f) See § 51.

(d) See § 51.

(g) See *ante*, pp. 1250, 1412, and 1422.

(e) See *ante*, p. 1411.

APPENDIX V.

Notice of resolution to wind up voluntarily.

[20 Vict. c. 47, § 103.]

Consequences of voluntary winding up.

[20 Vict. c. 47, § 104.]

members of the company taking place after the commencement of such winding up, shall be void (*h*); but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up (*i*).

132. Notice of any special resolution or extraordinary resolution passed for winding up a company voluntarily shall be given by advertisement, as respects companies registered in England in the "London Gazette," as respects companies registered in Scotland in the "Edinburgh Gazette," and as respects companies registered in Ireland in the "Dublin Gazette."

133. The following consequences shall ensue upon the voluntary winding up of a company :

- (1.) The property of the company shall be applied in satisfaction of its liabilities *pari passu* (*k*), and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members, according to their rights and interests in the company :
- (2.) Liquidators shall be appointed for the purpose of winding up the affairs of the company and distributing the property :
- (3.) The company in general meeting shall appoint such persons or person as it thinks fit to be liquidators or a liquidator, and may fix the remuneration to be paid to them or him (*l*) :
- (4.) If one person only is appointed, all the provisions herein contained in reference to several liquidators shall apply to him :
- (5.) Upon the appointment of liquidators, all the power of the directors shall cease, except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers :
- (6.) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination by any number not less than two :
- (7.) The liquidators may, without the sanction of the court, exercise all powers by this act given to the official liquidator (*m*) :
- (8.) The liquidators may exercise the powers hereinbefore given to the court of settling the list of contributories of the company, and any list so settled shall be *prima facie* evidence of the liability of the persons named therein to be contributories (*n*) :
- (9.) The liquidators may at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and the liquidators may in making a call take into consideration

(*h*) See § 153, and *ante*, pp. 1251, 1356 and 1412. pp. 1413 *et seq.*

(*i*) See §§ 142, 143, and *ante*, p. 1412.

(*k*) See § 159.

(*l*) See §§ 135 and 140, 141, and *ante*,

(*m*) See §§ 95, 138, 139, 159, 160, and *ante*, pp. 1413—1418.

(*n*) See §§ 98, 99, and *ante*, p. 1414.

the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same (o):

(10.) The liquidators shall pay the debts of the company, and adjust the right of the contributories amongst themselves.

134. Where a company limited by guarantee, and having a capital divided into shares, is being wound up voluntarily, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a specialty debt due from each member to the company to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the liquidators (p).

Effect of winding up on share capital of company limited by guarantee.

135. A company about to be wound up voluntarily, or in the course of being wound up voluntarily, may, by an extraordinary resolution (q), delegate to its creditors, or to any committee of its creditors, the power of appointing liquidators or any of them, and supplying any vacancies in the appointment of liquidators, or may by a like resolution enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised; and any act done by the creditors in pursuance of such delegated powers shall have the same effect as if it had been done by the company.

Power of company to delegate authority to appoint liquidators.

136. Any arrangement entered into between a company about to be wound up voluntarily, or in the course of being wound up voluntarily, and its creditors, shall be binding on the company if sanctioned by an extraordinary resolution (q), and on the creditors if acceded to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned.

Arrangement when binding on creditors.

137. Any creditor or contributory of a company that has in manner aforesaid entered into any arrangement with its creditors may, within three weeks from the date of the completion of such arrangement, appeal to the court against such arrangement, and the court may thereupon, as it thinks just, amend, vary, or confirm the same (r).

Power of creditor or contributory to appeal.

138. Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the court (s) in England, Ireland, or Scotland, or to the Lord Ordinary on the bills in Scotland in time of vacation, to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court; and the court or Lord Ordinary in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the court thinks fit, or it may make such other order, interlocutor, or decree on such application as the court thinks just.

Power for liquidators or contributories in voluntary winding up to apply to court.

[22 Vict. c. 60, § 14.]

139. Where a company is being wound up voluntarily the liquidators may, from time to time, during the continuance of such winding up, summon general meetings of the company for the purpose of obtaining

Power of liquidators to call general meeting.

[21 Vict. c. 14, § 18.]

(o) See also § 102, and *ante*, p. 1418.

(p) See also § 90.

(q) § 129.

(r) See Rule 51.

(s) See Rule 51. See *ante*, p. 1414, and as to staying actions, &c., pp. 1256 and 1417.

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the sanction of the company by special resolution or extraordinary resolution, or for any other purposes they think fit; and in the event of the winding up continuing for more than one year, the liquidators shall summon a general meeting of the company at the end of the first year, and of each succeeding year from the commencement of the winding up, or as soon thereafter as may be convenient, and shall lay before such meeting an account showing their acts and dealings, and the manner in which the winding up has been conducted during the preceding year.

Power to fill up
vacancy in liqui-
dators.

[22 Vict. c. 60,
§ 15.]

140. If any vacancy occurs in the office of liquidators appointed by the company, by death, resignation, or otherwise, the company in general meeting may, subject to any arrangement they may have entered into with their creditors, fill up such vacancy, and a general meeting for the purpose of filling up such vacancy may be convened by the continuing liquidators, if any, or by any contributory of the company, and shall be deemed to have been duly held if held in manner prescribed by the regulations of the company, or in such other manner as may, on application by the continuing liquidator, if any, or by any contributory of the company, be determined by the court.

Power of court
to appoint liqui-
dators.

141. If from any cause whatever there is no liquidator acting in the case of a voluntary winding up, the court may, on the application of a contributory, appoint a liquidator or liquidators: the court may also, on due cause shown, remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding up (*t*).

Liquidators on
conclusion of
winding up to
make an ac-
count.

[20 Vict. c. 47,
§ 104.]

142. As soon as the affairs of the company are fully wound up, the liquidators shall make up an account showing the manner in which such winding up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidators: the meeting shall be called by advertisement, specifying the time, place, and object of such meeting; and such advertisement shall be published one month at least previously to the meeting, as respects companies registered in England in the "London Gazette," and as respects companies registered in Scotland in the "Edinburgh Gazette," and as respects companies registered in Ireland in the "Dublin Gazette."

Liquidators to
report meeting
to registrar.

[20 Vict. c. 47,
§ 104.]

143. The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held, and on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved: if the liquidators make default in making such return to the registrar they shall incur a penalty not exceeding five pounds for every day during which such default continues.

Costs of volun-
tary liquidation.

[20 Vict. c. 47,
§ 104.]

144. All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims.

Saving of rights
of creditors.

[20 Vict. c. 47,
§ 105.]

145. The voluntary winding up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the court, if the court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding up.

Power of court

146. Where a company is in course of being wound up voluntarily, and

(*t*) See Rule 51, and § 150, and *ante*, pp. 1413, 1423.

proceedings are taken for the purpose of having the same wound up by the court, the court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the court, provide in such order or in any other order for the adoption of all or any of the proceedings taken in the course of the voluntary winding up.

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to adopt proceedings of voluntary winding up.

[21 Vict. c. 14, § 19.]

Winding up subject to the supervision of the court (u).

147. When a resolution has been passed by a company to wind up voluntarily, the court may make an order directing that the voluntary winding up should continue, but subject to such supervision of the court, and with such liberty for creditors, contributories, or others, to apply to the court, and generally upon such terms and subject to such conditions as the court thinks just (x).

Power of court, on application, to direct winding up subject to supervision.

[21 Vict. c. 14, § 19.]

148. A petition, praying wholly or in part that a voluntary winding up should continue, but subject to the supervision of the court, and which winding up is hereinafter referred to as a winding up subject to the supervision of the court, shall, for the purpose of giving jurisdiction to the court over suits and actions, be deemed to be a petition for winding up the company by the court (y).

Petition for winding up subject to supervision.

[22 Vict. c. 60, § 2.]

149. The court may, in determining whether a company is to be wound up altogether by the court, or subject to the supervision of the court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories to be summoned, held, and regulated in such manner as the court directs for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court: in the case of creditors regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company (z).

Court may have regard to wishes of creditors.

[22 Vict. c. 60, §§ 2 and 3.]

150. Where any order is made by the court for a winding up subject to the supervision of the court, the court may, in such order or in any subsequent order, appoint any additional liquidator or liquidators; and any liquidators so appointed by the court shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if they had been appointed by the company; the court may from time to time remove any liquidators so appointed by the court, and fill up any vacancy occasioned by such removal, or by death or resignation (a).

Power to court to appoint additional liquidators in winding up subject to supervision.

[22 Vict. c. 60, § 3.]

151. Where an order is made for a winding up, subject to the supervision of the court, the liquidators appointed to conduct such winding up may, subject to any restrictions imposed by the court, exercise all their powers, without the sanction or intervention of the court, in the same manner as if the company were being wound up altogether voluntarily; but, save as aforesaid, any order made by the court for a winding up, subject to the

Effect of order of court for winding up subject to supervision.

[22 Vict. c. 60, § 4.]

(u) See *ante*, p. 1426.

see Rules 1—5, and see *ante*, pp. 1241 *et seq.*, and p. 1422.

(x) For form of order, see form No. 4, in the 3rd Schedule to the Rules.

(z) See also § 91, and Rules 45—47.

(y) See § 85; and as to the petition,

(a) See also § 141.

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Appointment in certain cases of voluntary liquidators to office of official liquidators.

[22 Vict. c. 60, § 8.]

Dispositions after the commencement of the winding up avoided.

[20 Vict. c. 47, § 73.]

The books of the company to be evidence.

[20 Vict. c. 47, § 81.]

As to disposal of books, accounts, and documents of the company.

Inspection of books.

[22 Vict. c. 60, § 7.]

supervision of the court, shall for all purposes, including the staying of actions, suits and other proceedings, be deemed to be an order of the court for winding up the company by the court, and shall confer full authority on the court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the court, and in the construction of the provisions whereby the court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding up, subject to the supervision of the court (b).

152. Where an order has been made for the winding up of a company, subject to the supervision of the court, and such order is afterwards superseded by an order directing the company to be wound up compulsorily, the court may, in such last-mentioned order, or in any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other persons, to be official liquidators.

Supplemental provisions.

153. Where any company is being wound up by the court or subject to the supervision of the court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company made between the commencement of the winding up (c) and the order for winding up, shall, unless the court otherwise orders, be void (d).

154. Where any company is being wound up, all books, accounts, and documents of the company and of the liquidators, shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded (e).

155. Where any company has been wound up under this act and is about to be dissolved, the books, accounts, and documents of the company and of the liquidators, may be disposed of in the following way; that is to say, where the company has been wound up by, or subject to the supervision of the court, in such way as the court directs, and where the company has been wound up voluntarily, in such way as the company by an extraordinary resolution directs; but after the lapse of five years from the date of such dissolution, no responsibility shall rest on the company, or the liquidators, or any one to whom the custody of such books, accounts, and documents has been committed, by reason that the same, or any of them, cannot be made forthcoming to any party or parties claiming to be interested therein.

156. Where an order has been made for winding up a company by the court, or subject to the supervision of the court, the court may make such order for the inspection by the creditors and contributories of the

(b) See as to this section, *ante*, p. 1422; as to the commencement of the winding up, pp. 1250 and 1422; as to staying actions, &c., p. 1255; as to dealings with property, p. 1251; and as to transfers of

shares, pp. 1356 *et seq.*

(c) See § 84.

(d) See also §§ 131, 163, 164, and *ante*, pp. 1251 and 1356 *et seq.*

(e) See *ante*, p. 1273.

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company of its books and papers as the court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories, in conformity with the order of the court, but not further or otherwise (*f*).

157. Any person to whom anything in action belonging to the company is assigned, in pursuance of this act, may bring or defend any action or suit relating to such thing in action in his own name.

Power of assignee to sue.

158. In the event of any company being wound up under this act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims, as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value (*g*).

Debts of all descriptions to be proved.

159. The liquidators may, with the sanction of the court (*h*), where the company is being wound up by the court or subject to the supervision of the court, and with the sanction of an extraordinary resolution (*i*) of the company, where the company is being wound up altogether voluntarily, pay any classes of creditors in full, or make such compromise, or other arrangement, as the liquidators may deem expedient with creditors or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable (*k*).

General scheme of liquidation may be sanctioned.

[22 Vict. c. 60, § 10.]

160. The liquidators may, with the sanction of the court (*l*) where the company is being wound up by the court or subject to the supervision of the court, and with the sanction of an extraordinary resolution (*m*) of the company where the company is being wound up altogether voluntarily, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities (*n*).

Power to compromise.

[22 Vict. c. 60, § 19.]

161. Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution (*o*) of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority

Power for liquidators to accept shares, &c., as a consideration for sale of property of company.

[21 Vict. c. 14, § 17.]

(*f*) See Rule 58, and *ante*, pp. 1263, 1272.

(*g*) See Rules 20—28, and *ante*, p. 1279 *et seq.*

(*h*) See Rules 49, 60—62.

(*i*) See § 129.

(*k*) See *ante*, p. 1276.

(*l*) See Rules 50, 60—62.

(*m*) See § 129.

(*n*) See *ante*, p. 1276.

(*o*) See § 51.

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in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up, subject to this proviso that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution: no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the court, such resolution shall not be of any validity unless it is sanctioned by the court (*p*).

Mode of determining price.

162. The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement, but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the purposes of such arbitration the provisions of "The companies clauses consolidation act, 1845," with respect to the settlement of disputes by arbitration (*q*), shall be incorporated with this act; and in the construction of such provisions this act shall be deemed to be the special act, and the "company" shall mean the company that is being wound up, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, if only one, or any two or more of the liquidators if more than one.

Certain attachments, &c., to be void.

[20 Vict. c. 47, § 80.]

Fraudulent preference.

[20 Vict. c. 47, § 76.]

163. Where any company is being wound up by the court or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents (*r*).

164. Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy

(*p*) See as to transfers of business under this section, *ante*, pp. 1277 and 1416.

(*q*) 8 & 9 Vict. c. 16, §§ 128—134.

(*r*) See also §§ 84, 85, 87, 197, 198, 201, 202, and see *ante*, p. 1255.

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to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly (s), and for the purposes of this section the presentation of a petition for winding up a company shall in the case of a company being wound up by the court or subject to the supervision of the court, and a resolution for winding up the company shall, in the case of a voluntary winding up, be deemed to correspond with the act of bankruptcy in the case of an individual trader: and any conveyance or assignment made by any company formed under this act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents.

165. Where, in the course of the winding up of any company under this act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any monies of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any monies so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the court thinks just (t).

Power of court to assess damages against delinquent directors and officers.

166. If any director, officer, or contributory of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour (u).

Penalty on falsification of books.
[20 Vict. c. 47, § 79.]

167. Where any order is made for winding up a company by the court or subject to the supervision of the court, if it appear in the course of such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible (x), the court may, on the application of any person interested in such winding up (y), or of its own motion, direct the official liquidators, or the liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.

Prosecution of delinquent directors in the case of winding up by court.
[22 Vict. c. 60, § 20.]

168. Where a company is being wound up altogether voluntarily, if it appear to the liquidators conducting such winding up that any past or

Prosecution of delinquent directors &c., in

(s) See as to such acts, *ante*, p. 1077.

(t) See *ante*, p. 1267.

(u) See also 24 & 25 Vict. c. 96, § 83, *ante*, p. 798.

(x) See 24 & 25 Vict. c. 96, §§ 82 *et seq.*, *ante*, p. 797.

(y) See Rule 51.

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case of voluntary winding up.

[22 Vict. c. 60, § 21.]

Penalty on perjury.

[11 & 12 Vict. c. 45, § 113.]

present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the court (z), to prosecute such offender, and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company in priority to all other liabilities.

169. If any person, upon any examination upon oath or affirmation authorised under this act, or in any affidavit, deposition, or solemn affirmation in or about the winding up of any company under this act, or otherwise in or about any matter arising under this act, wilfully and corruptly gives false evidence, he shall, upon conviction, be liable to the penalties of wilful perjury.

Power of courts to make rules.

Power of Lord Chancellor of Great Britain to make rules.

[20 Vict. c. 47, § 95, and 22 Vict. c. 60, § 11.]

170. In England, the lord chancellor of Great Britain, with the advice and consent of the master of the rolls, and any one of the vice-chancellors for the time being, or with the advice and consent of any two of the vice-chancellors, may, as often as circumstances require, make such rules concerning the mode of proceeding to be had for winding up a company in the court of chancery as may from time to time seem necessary; but until such rules are made the general practice of the court of chancery, including the practice hitherto in use in winding up companies, shall, so far as the same is applicable and not inconsistent with this act, apply to all proceedings for winding up a company (a).

Power of Court of Session in Scotland to make rules.

[20 Vict. c. 47, § 97.]

171. In Scotland, the court of session may make such rules concerning the mode of winding up as may be necessary by act of sederunt; but, until such rules are made, the general practice of the court of session in suits pending in such court shall, so far as the same is applicable and not inconsistent with this act, apply to all proceedings for winding up a company; and official liquidators shall in all respects be considered as possessing the same powers as any trustee on a bankrupt estate.

Power to make rules in Stannaries Court.

[20 Vict. c. 47, § 98.]

172. The vice-warden of the Stannaries may, from time to time, with the consent provided for by section twenty-three of the act of eighteenth of Victoria, chapter thirty-two, make rules for carrying into effect the powers conferred by this act upon the court of the vice-warden; but, subject to such rules, the general practice of the said court, and of the registrar's office in the said court, including the present practice of the said court in winding up companies, may be applied to all proceedings under this act. The said vice-warden may likewise, with the same consent, make from time to time rules for specifying the fees to be taken in his said court in proceedings under this act; and any rules so made shall be of the same force as if they had been enacted in the body of this act. And the fees paid in respect of proceedings taken under this act, including fees taken under "The joint stock companies act, 1856," in the matter of winding up companies, shall be applied exclusively towards payment of such additional officers, or such increase of the salaries of existing officers, or pensions to retired officers, or such other needful expenses of the court, as the lord warden of the Stannaries shall, from time to time,

(z) See Rule 51, and *ante*, p. 1415.

(a) See *ante*, p. 1260. Under the above section rules have been promul-

gated. See *infra*, Appendix No. 6; and as to the general practice of the Court of Chancery, see Rules 74 and 75.

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on the application of the vice-warden or otherwise, think fit to direct, sanction, or assign, and meanwhile shall be kept as a separate fund, apart from the ordinary fees of the court arising from other business, to await such direction and order of the lord warden herein, and to accumulate by investment in government securities until the whole shall have been so appropriated (*b*).

173. In Ireland the lord chancellor of Ireland may, as respects the winding up of companies in Ireland, with the advice and consent of the master of the rolls in Ireland, exercise the same power of making rules as is by this act hereinbefore given to the lord chancellor of Great Britain; but, until such rules are made the general practice of the court of chancery in Ireland, including the practice hitherto in use in Ireland in winding up companies, shall, so far as the same is applicable and not inconsistent with this act, apply to all proceedings for winding up a company.

Power of Lord Chancellor of Ireland to make rules.

[20 Vict. c. 47, § 96.]

PART V.

REGISTRATION OFFICE.

174. The registration of companies under this act shall be conducted as follows (that is to say):—

Constitution of registration office.

[20 Vict. c. 47, § 106.]

- (1.) The board of trade may, from time to time, appoint such registrars, assistant registrars, clerks, and servants as they may think necessary for the registration of companies under this act, and remove them at pleasure:
- (2.) The board of trade may make such regulations as they think fit with respect to the duties to be performed by any such registrars, assistant registrars, clerks, and servants as aforesaid:
- (3.) The board of trade may, from time to time, determine the places at which offices for the registration of companies are to be established, so that there be at all times maintained in each of the three parts of the United Kingdom at least one such office; and that no company shall be registered except at an office within that part of the United Kingdom in which, by the memorandum of association, the registered office of the company is declared to be established, and the board may require that the registrar's office of the court of the vice-warden of the Stannaries shall be one of the offices for the registration of companies formed for working mines within the jurisdiction of the court:
- (4.) The board of trade may, from time to time, direct a seal or seals to be prepared for the authentication of any documents required for or connected with the registration of companies:
- (5.) Every person may inspect the documents kept by the registrar of joint stock companies; and there shall be paid for such inspection such fees as may be appointed by the board of trade, not exceeding one shilling for each inspection; and any person

(*b*) Rules have been issued under this present work. They are published by section, but they are not printed in the Stevens and Sons.

APPENDIX V.

may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar: and there shall be paid for such certificate of incorporation, certified copy, or extract, such fees as the board of trade may appoint, not exceeding five shillings for the certificate of incorporation, and not exceeding sixpence for each folio of such copy or extract, or, in Scotland, for each sheet of two hundred words:

- (6.) The existing registrar, assistant registrars, clerks, and other officers and servants in the office for the registration of joint stock companies shall, during the pleasure of the board of trade, hold the offices and receive the salaries hitherto held and received by them, but they shall in the execution of their duties conform to any regulations that may be issued by the board of trade:
- (7.) There shall be paid to any registrar, assistant registrar, clerk, or servant that may hereafter be employed in the registration of joint stock companies such salary as the board of trade may, with the sanction of the commissioners of the treasury, direct:
- (8.) Whenever any act is herein directed to be done to or by the registrar of joint stock companies, such act shall, until the board of trade otherwise directs, be done in England to or by the existing registrar of joint stock companies, or in his absence to or by such person as the board of trade may for the time being authorise; in Scotland to or by the existing registrar of joint stock companies in Scotland; and in Ireland to or by the existing assistant registrar of joint stock companies for Ireland, or by such person as the board of trade may for the time being authorise in Scotland or Ireland in the absence of the registrar; but in the event of the board of trade altering the constitution of the existing registry office, such act shall be done to or by such officer or officers and at such place or places with reference to the local situation of the registered offices of the companies to be registered as the board of trade may appoint.

PART VI.

APPLICATION OF ACT TO COMPANIES REGISTERED UNDER THE JOINT-STOCK COMPANIES ACTS.

Definition of
Joint-stock com-
panies acts.

175. The expression "Joint-stock companies acts" as used in this act shall mean "The joint-stock companies act, 1856," "The joint-stock companies act, 1856, 1857," "The joint-stock banking companies act, 1857," "The act to enable joint-stock banking companies to be formed on the principle of limited liability," or any one or more of such acts, as the case may require; but shall not include the act passed in the eighth year of the reign of Her present Majesty, chapter one hundred and ten, and intituled "An act for the registration, incorporation, and regulation of joint-stock companies."

Application of
act to companies

176. Subject as hereinafter mentioned, this act, with the exception of table A. in the first schedule, shall apply to companies formed and

registered under the said Joint-stock companies acts, or any of them, in the same manner in the case of a limited company as if such company had been formed and registered under this act as a company limited by shares, and in the case of a company other than a limited company as if such company had been formed and registered as an unlimited company under this act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint-stock companies acts, or any of them, and the power of altering regulations by special resolution given by this act (c) shall, in the case of any company formed and registered under the said Joint-stock companies acts, or any of them, extend to altering any provisions contained in the table marked B. annexed to "The joint-stock companies act, 1856," and shall also in the case of an unlimited company formed and registered as last aforesaid extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding such regulations are contained in the memorandum of association (d).

177. This act shall apply to companies registered but not formed under the said Joint-stock companies acts or any of them in the same manner as it is hereinafter declared (e) to apply to companies registered but not formed under this act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint-stock companies acts, or any of them (f).

178. Any company registered under the said Joint-stock companies acts, or any of them, may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct.

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formed under
Joint-stock com-
panies acts.

Application of
act to companies
registered under
Joint-stock com-
panies acts.

Mode of trans-
ferring shares.

PART VII.

COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT.

179. The following regulations shall be observed with respect to the registration of companies under this part of this act; (that is to say,)

- (1.) No company having the liability of its members limited by act of Parliament or letters patent, and not being a joint-stock company as hereinafter defined (g), shall register under this act in pursuance of this part thereof:
- (2.) No company having the liability of its members limited by act of Parliament, or by letters patent, shall register under this act in pursuance of this part thereof as an unlimited company, or as a company limited by guarantee:
- (3.) No company that is not a joint-stock company, as hereinafter defined (g), shall in pursuance of this part of this act register under this act as a company limited by shares:

Regulations as to
registration of
existing compa-
nies.

(c) See §§ 50 and 196.

(d) See *ante*, p. 168.

(e) See Part VII.

(f) See *ante*, p. 168

(g) § 181.

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- (4.) No company shall register under this act in pursuance of this part thereof, unless an assent to its so registering is given by a majority of such of its members as may be present, personally or by proxy, in cases where proxies are allowed by the regulations of the company, at some general meeting summoned for the purpose :
- (5.) Where a company not having the liability of its members limited by act of Parliament or letters patent, is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present, personally or by proxy, at such last-mentioned general meeting :
- (6.) Where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount :

In computing any majority under this section, when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the company of which he is a member.

Companies capable of being registered.

[21 Vict. c. 14, § 29.]

180. With the above exceptions, and subject to the foregoing regulations (*h*), every company existing at the time of the commencement of this act, including any company registered under the said Joint-stock companies acts (*i*), consisting of seven or more members, and any company hereafter formed in pursuance of any act of Parliament other than this act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this act as an unlimited company, or a company limited by shares, or a company limited by guarantee ; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up.

Definition of joint-stock company.

181. For the purposes of this part of this act, so far as the same relates to the description of companies empowered to register as companies limited by shares, a joint-stock company shall be deemed to be a company having a permanent paid-up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital, or the holders of such stock, and no other persons ; and such company when registered with limited liability under this act shall be deemed to be a company limited by shares.

(*h*) See also §§ 182—184, and 188.

though they do not register. See §§

(*i*) The act applies to them, even 176, 177, and *ante*, pp. 168 and 1410.

182. No banking company claiming to issue notes in the United Kingdom shall be entitled to limited liability in respect of such issue, but shall continue subject to unlimited liability in respect thereof, and, if necessary, the assets shall be marshalled for the benefit of the general creditors, and the members shall be liable for the whole amount of the issue, in addition to the sum for which they would be liable as members of a limited company (*j*).

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Proviso as to banking company.
[22 Vict. c. 91, § 1.]

183. Previously to the registration, in pursuance of this part of this act, of any joint-stock company (*k*), there shall be delivered to the registrar the following documents (that is to say):—

Requisitions for registration by companies.

- (1.) A list showing the names, addresses, and occupations of all persons who, on a day named in such list, and not being more than six clear days before the day of registration, were members of such company, with the addition of the shares held by such persons respectively, distinguishing, in cases where such shares are numbered, each share by its number:
- (2.) A copy of any act of Parliament, royal charter, letters patent, deed of settlement, contract of copartnery, cost-book regulations, or other instrument constituting or regulating the company (*l*):
- (3.) If any such joint-stock company is intended to be registered as a limited company, the above list and copy shall be accompanied by a statement specifying the following particulars (that is to say):

The nominal capital of the company, and the number of shares into which it is divided;

The number of shares taken, and the amount paid on each share;

The name of the company, with the addition of the word "limited" as the last word thereof (*m*);

With the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of the guarantee.

184. Previously to the registration in pursuance of this part of this act of any company not being a joint-stock company (*n*), there shall be delivered to the registrar a list showing the names, addresses, and occupations of the directors or other managers (if any) of the company: also a copy of any act of Parliament, letters patent, deed of settlement, contract of copartnery, cost-book regulations, or other instrument constituting or regulating the company, with the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of guarantee.

Requisitions for registration by existing company not being a joint-stock company.

185. Where a joint-stock company (*o*), authorised to register under this act, has had the whole or any portion of its capital converted into stock, such company shall, as to the capital so converted, instead of delivering to the registrar a statement of shares, deliver to the registrar a statement of the amount of stock belonging to the company, and the names of the persons who were holders of such stock, on some day to

Power for existing company to register amount of stock instead of shares.
[21 Vict. c. 14, § 30.]

(*j*) See also § 188.

Vict. c. 110.

(*k*) § 181.

(*m*) See § 190.

(*l*) See § 209, as to insurance companies already registered under 7 and 8

(*n*) § 181.

(*o*) § 181.

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Authentication of statements of existing companies.

[20 Vict. c. 47, § 112.]

Registrar may require evidence as to nature of company.

On registration of banking company with limited liability, notice to be given to customers.

[22 Vict. c. 91, § 3.]

Exemption of certain companies from payment of fees.

[21 Vict. c. 14, § 32.]

Power to company to change name.

[20 Vict. c. 47, § 114.]

Certificate of registration of existing companies.

[20 Vict. c. 47, § 113.]

Certificate to be evidence of com-

be named in the statement, not more than six clear days before the day of registration.

186. The lists of members and directors, and any other particulars relating to the company hereby required to be delivered to the registrar, shall be verified by a declaration of the directors of the company delivering the same, or any two of them, or of any two other principal officers of the company, made in pursuance of the act passed in the sixth year of the reign of his late Majesty King William the Fourth, chapter sixty-two.

187. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether an existing company is or not a joint-stock company as hereinbefore defined (*p*).

188. Every banking company existing at the date of the passing of this act, which registers itself as a limited company, shall, at least thirty days previous to obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same to every person and partnership firm who have a banking account with the company; and such notice shall be given either by delivering the same to such person or firm, or leaving the same, or putting the same into the post addressed to him or them at such address as shall have been last communicated or otherwise become known as his or their address to or by the company: and, in case the company omits to give any such notice as is hereinbefore required to be given, then, as between the company and the person or persons only who are for the time being interested in the account in respect of which such notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which such notice shall be given, but not further or otherwise, the certificate of registration with limited liability shall have no operation (*q*).

189. No fees shall be charged in respect of the registration in pursuance of this part of this act of any company in cases where such company is not registered as a limited company, or where previously to its being registered as a limited company the liability of the shareholders was limited by some other act of Parliament or by letters patent.

190. Any company authorised by this part of this act to register with limited liability shall, for the purpose of obtaining registration with limited liability, change its name, by adding thereto the word "limited."

191. Upon compliance with the requisitions in this part of this act contained with respect to registration, and upon payment of such fees, if any, as are payable under the tables marked B. and C. in the first schedule hereto, the registrar shall certify under his hand that the company so applying for registration is incorporated as a company under this act, and, in the case of a limited company, that it is limited, and thereupon such company shall be incorporated, and shall have perpetual succession and a common seal, with power to hold lands; and any banking company in Scotland so incorporated shall be deemed and taken to be a bank incorporated, constituted, or established by or under act of Parliament (*r*).

192. A certificate of incorporation given at any time to any company registered in pursuance of this part of this act shall be conclusive evidence

(*p*) § 181.

(*q*) See § 182.

(*r*) See § 18.

that all the requisitions herein contained in respect of registration under this act have been complied with, and that the company is authorised to be registered under this act as a limited or unlimited company, as the case may be, and that the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this act (*s*).

193. All such property, real and personal, including all interests and rights in, to, and out of property, real and personal, and including obligations and things in action, as may belong to or be vested in the company at the date of its registration under this act, shall on registration pass to and vest in the company as incorporated under this act for all the estate and interest of the company therein (*t*).

194. The registration in pursuance of this part of this act of any company shall not affect or prejudice the liability of such company to have enforced against it, or its right to enforce, any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of such company previously to such registration (*u*).

[20 Vict. c. 47, § 116, and 21 Vict. c. 49, § 8.]

195. All such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of this part of this act have been commenced by or against such company, or the public officer or any member thereof, may be continued in the same manner as if such registration had not taken place; nevertheless, execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company (*x*).

196. When a company is registered under this act in pursuance of this part thereof, all provisions contained in any act of Parliament, deed of settlement, contract of copartnery, cost-book regulations, letters patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association; and all the provisions of this act shall apply to such company and the members, contributories, and creditors thereof, in the same manner in all respects [as if it had been formed under this act, subject to the provisions following; (that is to say),

- (1.) That table A. in the first schedule to this act shall not, unless adopted by special resolution, apply to any company registered under this act in pursuance of this part thereof:
- (2.) That the provisions of this act relating to the numbering of shares (*y*) shall not apply to any joint-stock company whose shares are not numbered:

(*s*) Compare § 188; and see as to the certificate, *ante*, p. 165.

(*t*) See *ante*, p. 494.

(*u*) See *ante*, p. 175; *Fountain's case*

there referred to, is also in 11 Jur. N. S. 553, L. C.

(*x*) See *ante*, p. 494.

(*y*) § 22.

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pliance with act.

[20 Vict. c. 47, § 115.]

Transfer of property to company.

Registration under this act not to affect obligations incurred previously to registration.

[20 Vict. c. 47, § 116, and 21 Vict. c. 49, § 8.]

Continuation of existing actions and suits.

[20 Vict. c. 47, § 116, and 21 Vict. c. 49, § 10.]

Effect of registration under act.

[21 Vict. c. 14, § 33.]

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- (3.) That no company shall have power to alter any provision contained in any act of Parliament relating to the company :
- (4.) That no company shall have power, without the sanction of the Board of Trade, to alter any provision contained in any letters patent relating to the company :
- (5.) That in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted prior to registration, who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company contracted prior to registration, or to pay or contribute to the payment of any sum, for the adjustment of the rights of the members amongst themselves in respect of any such debt or liability ; or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid ; and every such contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid ; and in the event of the death, bankruptcy, or insolvency of any such contributory as last aforesaid, or marriage of any such contributory being a female, the provisions hereinbefore contained with respect to the representatives, heirs, and devisees of deceased contributories, and with reference to the assignees of bankrupt or insolvent contributories, and to the husbands of married contributories, shall apply (z).
- (6.) That nothing herein contained shall authorise any company to alter any such provisions contained in any deed of settlement, contract of copartnery, cost-book regulations, letters patent, or other instrument constituting or regulating the company, as would, if such company had originally been formed under this act, have been contained in the memorandum of association, and are not authorised to be altered by this act :

But nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this act in pursuance of this part thereof by virtue of any act of Parliament, deed of settlement, contract of copartnery, letters patent, or other instrument constituting or regulating the company (a).

Power of court to restrain further proceedings.
[20 Vict. c. 47, § 84.]

197. The court may, at any time after the presentation of a petition for winding up a company registered in pursuance of this part of this act, and before making an order for winding up the company, upon the application by motion of any creditor of the company, restrain further proceedings in any action, suit, or legal proceeding against any contributory of the company as well as against the company as hereinbefore provided, upon such terms as the court thinks fit (b).

Order for winding up company.
[20 Vict. c. 47, § 73.]

198. Where an order has been made for winding up a company regis-

(z) See §§ 74—78, 105, 106, and as to Industrial and Provident Societies, *ante*, p. 1430.

(a) As to the power of a company registered under this act to alter its me-

morandum of association, see § 12 ; and as to its power to alter its articles of association, see §§ 50 and 176.

(b) See §§ 85, 195, 196, and also § 201.

tered in pursuance of this part of the act, in addition to the provisions hereinbefore contained (c); it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company except with the leave of the court, and subject to such terms as the court may impose (d).

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PART VIII.

APPLICATION OF ACT TO UNREGISTERED COMPANIES.

199. Subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by act of Parliament (e), consisting of more than seven members, and not registered under this act, and hereinafter included under the term unregistered company (f), may be wound up under this act, and all the provisions of this act with respect to winding up shall apply to such company, with the following exceptions and additions (g).

Winding up of
unregistered
companies.

[11 & 12 Vict.
c. 45, §§ 1—3.]

(1.) An unregistered company shall, for the purpose of determining the court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or, if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; moreover, the principal place of business of an unregistered company, or (where it has a principal place of business situate in more than one part of the United Kingdom) such one of its principal places of business as is situate in that part of the United Kingdom in which proceedings are being instituted, shall for all the purposes of the winding up of such company be deemed to be the registered office of the company:

(2.) No unregistered company shall be wound up under this act voluntarily or subject to the supervision of the court (h):

(3.) The circumstances under which an unregistered company may be wound up are as follows (i): (that is to say),

(a.) Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(b.) Whenever the company is unable to pay its debts;

(c.) Whenever the court is of opinion that it is just and equitable that the company should be wound up:

(c) See §§ 87 and 196.

but see as to such companies, *supra*, §§ 176, 177.

(d) See §§ 195 and 202; and see *ante*, p. 1258.

(g) See *ante*, 1219.

(e) See *ante*, p. 1219.

(h) See, as to Industrial and Provident Societies, *ante*, p. 1430.

(f) This definition includes companies registered under the acts of 1856—1858;

(i) See *ante*, pp. 1223—1241.

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[20 Vict. c. 47,
§ 68. and 11 &
12 Vict. c. 45,
§ 5.]

(4.) An unregistered company shall, for the purposes of this act, be deemed to be unable to pay its debts (*k*).

(a.) Whenever a creditor to whom the company is indebted, at law or in equity, by assignment or otherwise, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by otherwise serving the same in such manner as the court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor:

(b.) Whenever any action, suit, or other proceeding has been instituted against any member of the company for any debt or demand due, or claimed to be due, from the company, or from him in his character of member of the company, and notice in writing of the institution of such action, suit, or other legal proceeding having been served upon the company by leaving the same at the principal place of business of the company, or by delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in such manner as the court may approve or direct, the company has not within ten days after service of such notice paid, secured, or compounded for such debt or demand, or procured such action, suit, or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against such action, suit, or other legal proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same:

(c.) Whenever, in England or Ireland, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor in any proceeding at law or in equity, instituted by such creditor against the company, or any member thereof as such, or against any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied:

(d.) Whenever, in the case of an unregistered company engaged in working mines within and subject to the jurisdiction of the Stannaries, a customary decree or order absolute for the sale of the machinery, materials, and effects of such mine has been made in a creditor's suit in the court of the vice-warden:

(e.) Whenever, in Scotland, the *induciae* of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made:

(f.) Whenever it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts.

(*k*) See, as to registered companies, §§ 79, 80.

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200. In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges and expenses of winding up the company, and every such contributory shall be liable to contribute to the assets of the company in the course of the winding up all sums due from him in respect of any such liability as aforesaid; but in the event of the death, bankruptcy, or insolvency of any contributory, or marriage of any female contributory, the provisions hereinbefore contained with respect to the personal representatives, heirs, and devisees of a deceased contributory, and to the assignees of a bankrupt or insolvent contributory, and to the husband of married contributories, shall apply (*l*).

Who to be deemed a contributory in the event of company being wound up. [11 & 12 Vict. c. 45, § 3.]

201. The court may, at any time after the presentation of a petition for winding up an unregistered company, and before making an order for winding up the company, upon the application of any creditor of the company, restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company as hereinbefore provided (*m*), upon such terms as the court thinks fit.

Power of court to restrain further proceedings. [20 Vict. c. 47, § 84.]

202. Where an order has been made for winding up an unregistered company in addition to the provisions hereinbefore contained in the case of companies formed under this act (*n*), it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the court, and subject to such terms as the court may impose.

Effect of order for winding up company. [20 Vict. c. 47, § 73.]

203. If any unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the court may by the order made for winding up such company, or by any subsequent order, direct that all such property, real and personal, including all interest, claims, and rights into and out of property, real and personal, and including things in action, as may belong to or be vested in the company, or to or in any person or persons on trust for or on behalf of the company, or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or names, and thereupon the same or such part thereof as may be specified in the order shall vest accordingly, and the official liquidator or official liquidators may, in his or their official name or names, or in such name or names and after giving such indemnity as the court directs, bring or defend any actions, suits, or other legal proceeding relating to any property vested in him or them, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purpose, of effectually winding up the company and recovering the property thereof (*o*).

Provision in case of unregistered company. [11 & 12 Vict. c. 45, § 29.]

204. The provisions made by this part of the act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any provisions hereinbefore contained with respect to wind-

Provisions in this part of act cumulative.

(*l*) See §§ 74—78, and 105, 106, and as to Industrial and Provident Societies, *ante*, p. 1430.

and *ante*, p. 1258.

(*n*) See §§ 87, 199, 204; and *ante*, p. 1258.

(*m*) See also §§ 85, 197, 199, 204;

(*o*) See *ante*, pp. 1273—5.

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ing up companies by the court, and the court or official liquidator may, in addition to anything contained in this part of the act, exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed under this act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this act, and then only to the extent provided by this part of this act.

PART IX.

REPEAL OF ACTS, AND TEMPORARY PROVISIONS.

Repeal of acts.

205. After the commencement of this act there shall be repealed the several acts specified in the first part of the third schedule hereto, with this qualification, that so much of the said acts as is set forth in the second part of the said third schedule shall be hereby re-enacted and continue in force as if unrepealed ().

Saving clause as to repeal.

206. No repeal hereby enacted shall affect (q),

- (1.) Anything duly done under any acts hereby repealed :
- (2.) The incorporation of any company registered under any act hereby repealed :
- (3.) Any right or privilege acquired or liability incurred under any act hereby repealed :
- (4.) Any penalty, forfeiture, or other punishment incurred in respect of any offence against any act hereby repealed :
- (5.) Table B. in the schedule annexed to the Joint-stock companies act, 1856, or any part thereof, so far as the same applies to any company existing at the time of the commencement of this act (r).

Saving of existing proceedings for winding up.

207. Where previously to the commencement of this act an order has been made for winding up a company under any acts or act hereby repealed, or a resolution has been passed for winding up a company voluntarily, such company shall be wound up in the same manner and with the same incidents as if this act were not passed, and for the purposes of such winding up such repealed acts or act shall be deemed to remain in full force (s).

Saving of conveyance deeds.

208. Where previously to the commencement of this act any conveyance, mortgage, or other deed has been made in pursuance of any act hereby repealed, such deed shall be of the same force as if this act had not passed, and for the purposes of such deed such repealed act shall be deemed to remain in full force.

Compulsory registration of certain companies.

209. Every insurance company completely registered under the act passed in the eighth year of the reign of her present Majesty, chapter one hundred and ten, intituled "An act for the registration, incorporation, and regulation of joint-stock companies," shall on or before the second day of November, one thousand eight hundred and sixty-two, and every other company required by any act hereby repealed to register under the

(p) See §§ 170—173.

(q) See *ante*, p. 177.

(r) See § 176.

(s) See *West Silver Bank Mining Co.*, 32 Beav. 226; *Fire Annihilator Co.*, *ib.* 563.

said Joint-stock companies acts, or one of such acts, and which has not so registered, shall, on or before the expiration of the thirty-first day from the commencement of this act, register itself as a company under this act, in manner and subject to the regulations hereinbefore contained (*t*), with this exception, that no company completely registered under the said act of the eighth year of the reign of her present Majesty shall be required to deliver to the registrar a copy of its deed of settlement; and for the purpose of enabling such insurance companies as are mentioned in this section to register under this act, this act shall be deemed to come into operation immediately on the passing thereof; nevertheless the registration of such companies shall not have any effect until the time of the commencement of this act. No fees shall be charged in respect of the registration of any company required to register by this section.

210. If any company required by the last section to register under this act makes default in complying with the provisions thereof, then, from and after the day upon which such company is required to register under this act, until the day on which such company is registered under this act (which it is empowered to do at any time), the following consequences shall ensue; (that is to say),

Penalty on company not registering.

[21 Vict. c. 14, § 28.]

- (1.) The company shall be incapable of suing either at law or in equity, but shall not be incapable of being made a defendant to a suit either at law or in equity (*u*):
- (2.) No dividend shall be payable to any shareholder in such company:
- (3.) Each director or manager of the company shall, for each day during which the company so being in default carries on business, incur a penalty not exceeding five pounds, and such penalty may be recovered by any person, whether a shareholder or not in the company, and be applied by him to his own use:

Nevertheless, such default shall not render the company so being in default illegal, nor subject it to any penalty or disability, other than as specified in this section; and registration under this act shall cancel any penalty or forfeiture, and put an end to any disability which any company may have incurred under any act hereby repealed, by reason of its not having registered under the Joint-stock companies acts, 1856, 1857, or one of them.

211. Upon the application of the directors of any company registered under the Joint-stock companies acts as hereinbefore defined (*x*), or any of them, made within one year after the date of the commencement of this act, sanctioned by a resolution passed at any extraordinary general meeting, but subject to the restrictions hereinafter mentioned, the Board of Trade shall have authority by their certificate in writing to change the registered office of any such company from any one part of the United Kingdom of Great Britain and Ireland, to any other part thereof, and the registrar of joint-stock companies with whom the memorandum of registration of such company has been registered shall, upon receipt of such certificate, note in writing upon the margin or at the foot of the said memorandum the name of the place to which such registered office is to be transferred, and the day upon which such transfer is pursuant to such

Temporary power for companies to change registered office.

(*t*) See §§ 179, *et seq.* § 180 enables these companies to register with limited liability. See *ante*, p. 167.

(*u*) See *ante*, p. 174.
(*x*) § 175.

APPENDIX V.

certificate to take place, and shall attach the certificate to the memorandum, and the said registrar shall thereupon transmit to the registrar of joint-stock companies for that part of the United Kingdom to which the registered office is to be so transferred, copies of the said certificate and of the said memorandum of registration so noted certified by him; and the said registrar for the last-mentioned part of the United Kingdom shall, upon receipt of such copies of certificate and memorandum, retain and register the same in like manner and on payment of the like fees to him as provided in the case of the registration of an original memorandum of registration, and thereupon the place of the registered office shall, from the said last-mentioned registration and the said day mentioned in the said certificate, be the place mentioned as such on the said certificate: Provided, however, that such change shall in nowise alter or affect anything theretofore done by the said company, or any of their rights or liabilities in respect thereof.

Restrictions on
issue of certifi-
cate.

212. The Board of Trade shall not issue their certificate in pursuance of the foregoing section, until they are satisfied that an advertisement of the intention of the company to apply to the Board of Trade for a certificate, with a declaration that all parties objecting thereto are forthwith to apply to the Board of Trade, has been published once at the least in each of four successive weeks in the newspapers following; that is to say, in some newspaper circulating in the district where the registered office of the company is situate, and also if the company is registered in England, in the "London Gazette," if in Ireland in the "Dublin Gazette," if in Scotland in the "Edinburgh Gazette," nor until the said Board are satisfied that the objections, if any, that may be urged against the issue of such certificate are groundless.

FIRST SCHEDULE.

TABLE A. (see §§ 14, 15) (y).

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES (z).

Shares (a).

First Schedule.
Table A.

- (1.) If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.

(y) This table corresponds to table B. in the act of 1856. The two are substantially alike in most respects. The regulations in the above table apply to companies formed under this act, and limited by shares, unless specially excluded. (See § 15.) But they do not, unless specially adopted, apply to companies existing before the passing of the act, and registered under it: § 196: see also § 176.

The Board of Trade has power to alter these regulations (see § 71); and every company to which they apply can alter them by a special resolution. See § 50.

(z) As to the construction of companies' regulations, see *ante*, pp. 801 *et seq.*

(a) Shares are personal estate, and must be numbered. See § 22 of the act. See *ante*, pp. 617, 660.

APPENDIX V.

Table A.

- (2.) Every member shall, on payment of one shilling, or such less sum as the company in general meeting may prescribe, be entitled to a certificate, under the common seal of the company, specifying the share or shares held by him, and the amount paid up thereon (b).
- (3.) If such certificate is worn out or lost, it may be renewed, on payment of one shilling, or such less sum as the company in general meeting may prescribe.

Calls on shares (c).

- (4.) The directors may, from time to time, make such calls upon the members in respect of all monies unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call (d); and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors (e).
- (5.) A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed.
- (6.) If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of five pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.
- (7.) The directors may, if they think fit, receive from any member willing to advance the same all or any part of the monies due upon the shares held by him beyond the sums actually called for; and upon the monies so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon.

Transfers of shares (f).

- (8.) The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.
- (9.) Shares in the company shall be transferred in the following form:—I A. B. of , in consideration of the sum of pounds paid to me by C. D. of , do hereby transfer to the said C. D. the share [or shares], numbered , standing in my name in the books of the company, to hold unto the said C. D., his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the

(b) See § 31 of the act.

95—97; and see *ante*, pp. 633, 636.(c) See, on this subject, *ante*, p. 624
et seq.

(e) § 16 makes calls specialty debts.

(d) See, as to giving notices, Nos.

(f) As to the sale and transfer of shares, see *ante*, pp. 700 *et seq.*

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Table A.

execution hereof; and I, the said C. D., do hereby agree to take the said share [or shares] subject to the same conditions. As witness our hands, the day of .

- (10.) The company may decline to register any transfer of shares made by a member who is indebted to them (*g*).
 (11.) The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of shares.

- (12.) The executors or administrators of a deceased member shall be the only persons recognised by the company as having any title to his share.
 (13.) Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company.
 (14.) Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person, to be named by him, registered as a transferee of such share (*h*).
 (15.) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.
 (16.) The instrument of transfer shall be presented to the company, accompanied with such evidence as the directors may require to prove the title of the transferor, and thereupon the company shall register the transferee as a member.

Forfeiture of shares (i).

- (17.) If any member fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him (*k*), requiring him to pay such call, together with interest and any expenses that may have accrued by reason of such non-payment.
 (18.) The notice shall name a further day, on or before which such call, and all interest and expenses that have accrued by reason of such non-payment, are to be paid. It shall also name the place where payment is to be made (the place so named being either the registered office of the company or some other place at which calls of the company are usually made payable). The notice shall also state that, in the event of non-payment at or before the time and at the place appointed, the shares in respect of which such call was made will be liable to be forfeited.

(*g*) See *ante*, pp. 683 *et seq.*, and pp. 1357 *et seq.*

(*h*) See also, as to executors and administrators, § 24 of the act.

(*i*) See, on this subject, *ante*, pp. 728 *et seq.*, and pp. 1371 *et seq.*

(*k*) The service may be personal, or by post. See Nos. 95—97.

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- (19.) If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may, at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof has been made, be forfeited, by a resolution of the directors to that effect.
- (20.) Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company in general meeting thinks fit (*l*).
- (21.) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture (*m*).
- (22.) A statutory declaration in writing, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

Conversion of shares into stock.

- (23.) The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock (*n*).
- (24.) When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interests, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the company may be transferred, or as near thereto as circumstances admit (*o*).
- (25.) The several holders of stock shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any

(*l*) The disposal of forfeited shares is special business. See Nos. 35, 36.

(*m*) See *ante*, p. 640.

(*n*) See the act, §§ 12, 28, 34.

(*o*) See the act, § 29.

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such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages (*p*).

Increase in capital (q).

- (26.) The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company in general meeting directs, or, if no direction is given, as the directors think expedient.
- (27.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company.
- (28.) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital.

General meetings (r).

- (29.) The first general meeting shall be held at such time, not being more than six months after the registration of the company, and at such place, as the directors may determine.
- (30.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.
- (31.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary (*s*).
- (32.) The directors may, whenever they think fit, and they shall upon a requisition made in writing by not less than one-fifth in number of the members of the company, convene an extraordinary general meeting.
- (33.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.

(*p*) See § 29 of the act, and *ante*, p. 616. meetings and the proceedings at them, *ante*, pp. 561 *et seq.*

(*q*) See § 12 of the act.

(*s*) See *ante*, p. 562.

(*r*) See § 49 of the act, and as to

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- (34.) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting (*t*).

Proceedings at general meetings (u).

- (35.) Seven days' notice at the least (*x*), specifying the place, the day, and the hour of meeting, and in case of special business (*y*) the general nature of such business, shall be given to the members in manner hereinafter mentioned (*z*), or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting (*a*).
- (36.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend and the consideration of the accounts, balance sheets, and the ordinary report of the directors.
- (37.) No business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to business, and such quorum shall be ascertained as follows; that is to say, if the persons who have taken shares in the company (*b*) at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed twenty (*c*).
- (38.) If within one hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved: in any other case, it shall stand adjourned to the same day in the next week, at the same time and place; and if at such adjourned meeting a quorum is not present, it shall be adjourned *sine die*.
- (39.) The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the company (*d*).
- (40.) If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman (*e*).
- (41.) The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place, but no

(*t*) See § 52 of the act.(*u*) See *ante*, pp. 561 *et seq.*(*x*) See § 52 of the act.(*y*) See No. 36.(*z*) See Nos. 95, 97.(*a*) See *ante*, 564.(*b*) This expression should apparently be, "if the *members* of the company."(*c*) See, as to quorums, *ante*, pp. 250, 557, 812, 813.(*d*) See § 52 of the act.(*e*) See § 52 of the act.

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business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place (*f*).

(42.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company (*g*), shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

(43.) If a poll is demanded by five or more members it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting the chairman shall be entitled to a second or casting vote.

Votes of members (h).

(44.) Every member shall have one vote for every share up to ten: he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares (*i*).

(45.) If any member is a lunatic or idiot he may vote by his committee, curator bonis, or other legal curator.

(46.) If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

(47.) No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.

(48.) Votes may be given either personally or by proxy (*k*).

(49.) The instrument appointing a proxy shall be in writing, under the hand of the appointor, or if such appointor is a corporation, under their common seal, and shall be attested by one or more witness or witnesses: no person shall be appointed a proxy who is not a member of the company.

(50.) The instrument appointing a proxy shall be deposited at the registered office of the company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.

(*f*) See *ante*, p. 563.

(*g*) See as to this, § 67 of the act.

(*h*) See *ante*, pp. 563 *et seq.*

(*i*) See § 52 of the act.

(*k*) See *ante*, p. 564.

- (51.) Any instrument appointing a proxy shall be in the following form (l):—

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Table A.

Company Limited.

I of in the county of being a member of
the Company Limited, and entitled to vote
or votes, hereby appoint of as my proxy,
to vote for me and on my behalf at the [ordinary or extraordinary,
as the case may be] general meeting of the company to be held on
the day of , and at any adjournment thereof
[or, at any meeting of the company that may be held in the
year].

As witness my hand, this day of .

Signed by the said in the presence of .

Directors (m).

- (52.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.
- (53.) Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors (n).
- (54.) The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the company in general meeting.

Powers of directors (o).

- (55.) The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made (p).
- (56.) The continuing directors may act notwithstanding any vacancy in their body.

(l) This must be stamped. See *ante*, p. 564. (o) See *ante*, pp. 250 *et seq.*, p. 894 and p. 1009.

(m) See *ante*, pp. 556, 575.

(p) See *infra*, No. 71.

(n) See *ante*, p. 576.

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Disqualification of directors (q).

(57.) The office of director shall be vacated—

If he holds any other office or place of profit under the company :

If he becomes bankrupt or insolvent ;

If he is concerned in or participates in the profits of any contract with the company ;

But the above rules shall be subject to the following exceptions :
That no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director ; nevertheless he shall not vote in respect of such contract or work ; and if he does so vote his vote shall not be counted.

Rotation of directors.

(58.) At the first ordinary meeting after the registration of the company the whole of the directors shall retire from office ; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

(59.) The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the company shall, unless the directors agree among themselves, be determined by ballot : in every subsequent year the one-third or other nearest number who have been longest in office shall retire.

(60.) A retiring director shall be re-eligible.

(61.) The company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

(62.) If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place ; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

(63.) The company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

(64.) Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

(65.) The company, in general meeting, may, by a special resolu-

(q) See *ante*, pp. 558, 576.

tion (r), remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead: the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed (s).

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Table A.

Proceedings of Directors (t).

- (66.) The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business: questions arising at any meeting shall be decided by a majority of votes: in case of an equality of votes the chairman shall have a second or casting vote: a director may at any time summon a meeting of the directors.
- (67.) The directors may elect a chairman at their meetings, and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.
- (68.) The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit: any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors (u).
- (69.) A committee may elect a chairman of their meetings: if no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.
- (70.) A committee may meet and adjourn as they think proper; questions arising at any meeting shall be determined by a majority of votes of the members present; and in case of an equality of votes the chairman shall have a second or casting vote.
- (71.) All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director (x).

(r) See the act, § 51.

(s) *Ante*, p. 560.(t) See *ante*, pp. 556 *et seq.*, and as to boards and quorums, *ante*, pp. 250, 557, 812, 813.(u) See *ante*, p. 577, and the references in the last note.(x) See § 67 of the act, and *ante*, p. 558.

Dividends (y.)

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Table A.

- (72.) The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares.
- (73.) No dividend shall be payable except out of the profits arising from the business of the company.
- (74.) The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select.
- (75.) The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.
- (76.) Notice of any dividend that may have been declared shall be given to each member in manner hereinafter mentioned (z), and all dividends unclaimed for three years, after having been declared, may be forfeited by the directors for the benefit of the company.
- (77.) No dividend shall bear interest as against the company.

Accounts (a).

- (78.) The directors shall cause true accounts to be kept,—
 Of the stock in trade of the company;
 Of the sums of money received and expended by the company, and the matter in respect of which such receipt and expenditure takes place; and
 Of the credits and liabilities of the company:
 The books of account shall be kept at the registered office of the company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection of the members during the hours of business (b).
- (79.) Once at the least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.
- (80.) The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters: every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss

(y) See *ante*, pp. 775 *et seq.*

(z) See Nos. 95—97.

(a) See *ante*, pp. 793 *et seq.*(b) See *ante*, pp. 560, 796.

APPENDIX V.

Table A.

may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

- (81.) A balance-sheet shall be made out in every year, and laid before the company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the company, arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit (c).
- (82.) A printed copy of such balance-sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served (d).

Audit.

- (83.) Once at the least in every year the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained, by one or more auditor or auditors.
- (84.) The first auditors shall be appointed by the directors: subsequent auditors shall be appointed by the company in general meeting.
- (85.) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.
- (86.) The auditors may be members of the company; but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the company; and no director or other officer of the company is eligible during his continuance in office.
- (87.) The election of auditors shall be made by the company at their ordinary meeting in each year.
- (88.) The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting.
- (89.) Any auditor shall be re-eligible on his quitting office.
- (90.) If any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.
- (91.) If no election of auditors is made in manner aforesaid the Board of Trade may, on the application of not less than five members of the company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the company for his services.
- (92.) Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.
- (93.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times, have

(c) See form at end of this table, (d) See No. 95.
infra, p. 1509.

APPENDIX V.

Table A.

access to the books and accounts of the company: he may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the company.

- (94.) The auditors shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether in their opinion, the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

- (95.) A notice may be served by the company upon any member either personally, or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.
- (96.) All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members; and notice so given shall be sufficient notice to all the holders of such share.
- (97.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notices was properly addressed and put into the post-office.

Dr. Co., made up to 18 Cr.

CAPITAL AND LIABILITIES.		PROPERTY AND ASSETS.	
	£ s. d.		£ s. d.
I. CAPITAL		III. PROPERTY held by the Company	
1 The Number of Shares		7 Immovable Property, distinguishing—	
2 The Amount paid per Share		(a.) Freehold Land	
3 If any Arrears of Calls, the Nature of the Arrear, and the Names of the Defaulters.		(b.) Buildings	
4 The Particulars of any forfeited Shares		(c.) Leasehold	
II. DEBTS AND LIABILITIES of the Company.		8 Movable Property, distinguishing—	
5 The Amount of Loans on Mortgages or Debenture Bonds		(d.) Stock in Trade	
6 The Amount of Debts owing by the Company, distinguishing—		(e.) Plant	
(a.) Debts for which Acceptances have been given		The Cost to be stated with Deductions for Deterioration in Value as charged to the Reserve Fund or Profit and Loss.	
(b.) Debts to Tradesmen for Supplies of Stock in Trade or other Articles			
(c.) Debts for Law Expenses		IV. DEBTS owing to the Company	
(d.) Debts for Interest on Debentures or other Loans		9 Debts considered good for which the Company hold Bills or other Securities	
(e.) Unclaimed Dividends		10 Debts considered good for which the Company hold no Security	
(f.) Debts not enumerated above		11 Debts considered doubtful and bad	
VI. RESERVE FUND		Any Debt due from a Director or other Officer of the Company to be separately stated	
Showing:			
The Amount set aside from Profits to meet Contingencies		V. CASH AND INVESTMENTS	
VII. PROFIT AND LOSS		12 The Nature of Investment and Rate of Interest	
Showing:		13 The Amount of Cash, where lodged, and if bearing Interest	
The disposable Balance for Payment of Dividend, &c			
CONTINGENT LIABILITIES			
Claims against the Company not acknowledged as Debts			
Monies for which the Company is contingently liable			

(c) See clauses 81 and 82 of the foregoing Table A.

APPENDIX V.

TABLE B. (See § 17.)

Table B.

TABLE OF FEES TO BE PAID TO THE REGISTRAR OF JOINT-STOCK COMPANIES
BY A COMPANY HAVING A CAPITAL DIVIDED INTO SHARES.

	£	s.	d.
For registration of a company whose nominal capital does not exceed 2,000 <i>l.</i> , a fee of	2	0	0
For registration of a company whose nominal capital exceeds 2,000 <i>l.</i> , the above fee of 2 <i>l.</i> , with the following additional fees, regulated according to the amount of nominal capital; (that is to say,) £ s. d.			
For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 2,000 <i>l.</i> , up to 5,000 <i>l.</i>	1	0	0
For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 5,000 <i>l.</i> , up to 100,000 <i>l.</i>	0	5	0
For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 100,000 <i>l.</i>	0	1	0
For registration of any increase of capital made after the first registration of the company, the same fees per 1,000 <i>l.</i> , or part of 1,000 <i>l.</i> , as would have been payable if such increased capital had formed part of the original capital at the time of registration.			
Provided that no company shall be liable to pay in respect of nominal capital on registration, or afterwards, any greater amount of fees than 50 <i>l.</i> , taking into account in the case of fees payable on an increase of capital after registration the fees paid on registration.			
For registration of any existing company, except such companies as are by this act exempted from payment of fees in respect of registration under this act (<i>f</i>), the same fee as is charged for registering a new company.			
For registering any document hereby required or authorised to be registered, other than the memorandum of association	0	5	0
For making a record of any fact hereby authorised or required to be recorded by the registrar of companies, a fee of	0	5	0

TABLE C. (See § 17.)

Table C.

TABLE OF FEES TO BE PAID TO THE REGISTRAR OF JOINT-STOCK COMPANIES
BY A COMPANY NOT HAVING A CAPITAL DIVIDED INTO SHARES.

	£	s.	d.
For registration of a company whose number of members as stated in the articles of association does not exceed 20	2	0	0
For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100	5	0	0
For registration of a company whose number of members, as			

(*f*) See §§ 189 and 209.

£ s. d. APPENDIX V.

Table C.

stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of 5*l.*, with an additional 5*s.* for every 50 members or less number than 50 members after the first 100.

For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of 20 0 0

For registration of any increase on the number of members made after the registration of the company in respect of every 50 members, or less than 50 members, of such increase . . . 0 5 0

Provided that no one company shall be liable to pay on the whole a greater fee than 20*l.* in respect of its number of members, taking into account the fee paid on the first registration of the company.

For registration of any existing company, except such companies as are by this act exempted from payment of fees in respect of registration under this act (*g*), the same fee as is charged for registering a new company.

For registering any document hereby required or authorised to be registered, other than the memorandum of association . . . 0 5 0

For making a record of any fact hereby authorised or required to be recorded by the registrar of companies, a fee of . . . 0 5 0

FORM D.

FORM OF STATEMENT REFERRED TO IN PART III. OF THE ACT.

(See § 44.)

* The capital of the company is , divided into shares Form D.
of each.

The number of shares issued is .

Calls to the amount of pounds per share have been made, under which the sum of pounds has been received.

The liabilities of the company on the first day of January (*or* July) were,—

Debts owing to sundry persons by the company:

On judgment, £

On specialty, £

On notes or bills, £

On simple contracts, £

On estimated liabilities, £

The assets of the company on that day were,—

Government securities [*stating them*], £

Bills of exchange and promissory notes, £

Cash at the bankers, £

Other securities, £

(*g*) See § 189.

* If the company has no capital divided into shares, the portion of the statement relating to capital and shares must be omitted.

APPENDIX V.

SECOND SCHEDULE (h).

Form A.

FORM A. (See § 8.)

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES.

- 1st. The name of the company is "The Eastern Steam Packet Company, Limited."
- 2nd. The registered office of the company will be situate in England.
- 3rd. The objects for which the company is established are, "the conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."
- 4th. The liability of the members is limited.
- 5th. The capital of the company is two hundred thousand pounds, divided into one thousand shares of two hundred pounds each.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of Shares taken by each Subscriber.
" 1. John Jones of	in the county of	Merchant	200
" 2. John Smith of	in the county of	. .	25
" 3. Thomas Green of	in the county of	. .	30
" 4. John Thompson of	in the county of	. .	40
" 5. Caleb White of	in the county of	. .	15
" 6. Andrew Brown of	in the county of	. .	5
" 7. Cæsar White of	in the county of	. .	10
Total shares taken			325

Dated the 22d day of November, 1861.
Witness to the above signatures,
A.B., No. 13, Hute Street, Clerkenwell, Middlesex.

Form B.

FORM B. (See §§ 9, 14.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND NOT HAVING A CAPITAL DIVIDED INTO SHARES.

Memorandum of association.

- 1st. The name of the company is "The Mutual London Marine Association, Limited."

(h) The forms in this schedule are to which they apply will be found in the given as examples, to be followed as sections referred to at the head of each closely as possible. (See § 71.) The cases form.

2nd. The registered office of the company will be situate in England :

APPENDIX V.

3rd. The objects for which the company is established are, “ the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above objects.”

Form B.

4th. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding ten pounds.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

“ 1. John Jones of	in the county of	Merchant.
“ 2. John Smith of	in the county of	
“ 3. Thomas Green of	in the county of	
“ 4. John Thompson of	in the county of	
“ 5. Caleb White of	in the county of	
“ 6. Andrew Brown of	in the county of	
“ 7. Cæsar White of	in the county of	

Dated the 22d day of November, 1861.

Witness to the above signatures,

A.B., No. 13, Hute Street, Clerkenwell, Middlesex.

ARTICLES OF ASSOCIATION TO ACCOMPANY PRECEDING MEMORANDUM OF ASSOCIATION. (See § 14.)

- (1.) The company, for the purpose of registration, is declared to consist of five hundred members.
- (2.) The directors hereinafter mentioned may, whenever the business of the association requires it, register an increase of members.

Definition of members.

- (3.) Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General meetings.

- (4.) The first general meeting shall be held at such time, not being more than three months after the incorporation of the company, and at such place, as the directors may determine.
- (5.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting ; and if no other time or place is prescribed, a general meeting

APPENDIX V.

Form B.

shall be held on the first Monday in February in every year, at such place as may be determined by the directors.

- (6.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.
- (7.) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any five or more members, convene an extraordinary general meeting.
- (8.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.
- (9.) Upon the receipt of such requisition the directors shall forthwith proceed to convene a general meeting: if they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other five members, may themselves convene a meeting.

Proceedings at general meetings.

- (10.) Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.
- (11.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance sheets, and the ordinary report of the directors.
- (12.) No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of such business; and such quorum shall be ascertained as follows; that is to say, if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed thirty.
- (13.) If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if convened upon the requisition of the members, shall be dissolved: in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.
- (14.) The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.
- (15.) If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of such meeting.
- (16.) The chairman may, with the consent of the meeting, adjourn

APPENDIX V.

Form B.

any meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

- (17.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.
- (18.) If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting.

Votes of members.

- (19.) Every member shall have one vote and no more.
- (20.) If any member is a lunatic or idiot he may vote by his committee, curator bonis, or other legal curator.
- (21.) No member shall be entitled to vote at any meeting unless all monies due from him to the company have been paid.
- (22.) Votes may be given either personally or by proxies: a proxy shall be appointed in writing under the hand of the appointor, or if such appointor is a corporation, under its common seal.
- (23.) No person shall be appointed a proxy who is not a member, and the instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.
- (24.) Any instrument appointing a proxy shall be in the following form:—

Company limited.

I of in the county of being a member of the company limited, hereby appoint of as my proxy, to vote for me and on my behalf at the [ordinary or extraordinary, *as the case may be*] general meeting of the company to be held on the day of , and at any adjournment thereof to be held on the day of next [or, at any meeting of the company that may be held in the year].

As witness my hand, this day of .
Signed by the said in the presence of .

Directors.

- (25.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.
- (26.) Until directors are appointed, the subscribers of the memorandum of association shall for all the purposes of this act be deemed to be directors.

APPENDIX V.

Form B.

Powers of directors.

- (27.) The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not hereby required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Election of directors.

- (28.) The directors shall be elected annually by the company in general meeting.

Business of company.

[Here insert rules as to mode in which business of insurance is to be conducted.]

Accounts.

- (29.) The accounts of the company shall be audited by a committee of five members, to be called the audit committee.
- (30.) The first audit committee shall be nominated by the director out of the body of members.
- (31.) Subsequent audit committees shall be nominated by the members at the ordinary general meeting in each year.
- (32.) The audit committee shall be supplied with a copy of the balance sheet, and it shall be their duty to examine the same with the accounts and vouchers relating thereto.
- (33.) The audit committee shall have a list delivered to them of all books kept by the company, and they shall at all reasonable times have access to the books and accounts of the company: they may, at the expense of the company, employ accountants or other persons to assist them in investigating such accounts, and they may in relation to such accounts examine the directors or any other officer of the company.
- (34.) The audit committee shall make a report to the members upon the balance sheet and accounts, and in every such report they shall state whether in their opinion the balance sheet is a full and fair balance sheet, containing the particulars required by these regulations of the company, and properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanation or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory, and such report shall be read together with the report of the directors at the ordinary meeting.

Notices.

- (35.) A notice may be served by the company upon any member either personally, or by sending it through the post in a pre-paid letter addressed to such member at his registered place of abode.
- (36.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would

be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed, and put into the post office.

APPENDIX V.

Form B.

Winding up.

- (37.) The company shall be wound up voluntarily whenever an extraordinary resolution, as defined by the Companies act, 1862, is passed, requiring the company to be wound up voluntarily.

Names, Addresses, and Descriptions of Subscribers.

" 1. John Jones of	in the county of	Merchant.
" 2. John Smith of	in the county of	
" 3. Thomas Green of	in the county of	
" 4. John Thompson of	in the county of	
" 5. Caleb White of	in the county of	
" 6. Andrew Brown of	in the county of	
" 7. Caesar White of	in the county of	

Dated the 22d day of November, 1861.

Witness to the above signatures,

A.B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM C. (See §§ 9 & 14.)

Form C.

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED
BY GUARANTEE, AND HAVING A CAPITAL DIVIDED INTO SHARES.

Memorandum of association.

1st. The name of the company is, "The Highland Hotel Company, Limited."

2nd. The registered office of the company will be situate in Scotland.

3rd. The objects for which the company is established are "the facilitating travelling in the Highlands of Scotland, by providing hotels and conveyances by sea and by land for the accommodation of travellers, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding twenty pounds.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

APPENDIX V.

Names, Addresses, and Descriptions of Subscribers.

Form C.

- " 1. John Jones of in the county of Merchant.
- " 2. John Smith of in the county of
- " 3. Thomas Green of in the county of
- " 4. John Thompson of in the county of
- " 5. Caleb White of in the county of
- " 6. Andrew Brown of in the county of
- " 7. Cæsar White of in the county of

Dated the 22d day of November, 1861.
Witness to the above signatures,
A.B., No. 13, Hute Street, Clerkenwell, Middlesex.

Articles of association to accompany preceding memorandum of association.
(See § 14.)

- 1. The capital of the company shall consist of five hundred thousand pounds, divided into five thousand shares of one hundred pounds each.
 - 2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares.
 - 3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.
 - 4. All the articles of Table A. shall be deemed to be incorporated with these articles, and to apply to the company.
- WE, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.				Number of Shares taken by each Subscriber.
" 1. John Jones of	in the county of	Merchant.		200
" 2. John Smith of	in the county of	.	.	25
" 3. Thomas Green of	in the county of	.	.	30
" 4. John Thompson of	in the county of	.	.	40
" 5. Caleb White of	in the county of	.	.	15
" 6. Andrew Brown of	in the county of	.	.	5
" 7. Cæsar White of	in the county of	.	.	10
Total shares taken				325

Dated the 22nd day of November, 1861.
Witness to the above signatures,
A.B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM D. (See §§ 10, 14.)

Form D.

MEMORANDUM AND ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY, HAVING A CAPITAL DIVIDED INTO SHARES.

Memorandum of association.

- 1st. The name of the company is "The Patent Stereotype Company."
- 2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are “the working of a patent method of founding and casting stereotype plates, of which method John Smith, of London, is the sole patentee.”

APPENDIX V.

Form D.

WE, the several persons whose names are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

“ 1. John Jones of	in the county of	Merchant.
“ 2. John Smith of	in the county of	
“ 3. Thomas Green of	in the county of	
“ 4. John Thompson of	in the county of	
“ 5. Caleb White of	in the county of	
“ 6. Andrew Brown of	in the county of	
“ 7. Abel Brown of	in the county of	

Dated 22nd day of November, 1861.

Witness to the above signatures,

A.B., No. 20, Bond Street, Middlesex.

Articles of association to accompany the preceding memorandum of association. (See § 14.)

Capital of the company.

The capital of the company is two thousand pounds, divided into twenty shares of one hundred pounds each.

Application of Table A.

All the articles of Table A. shall be deemed to be incorporated with these articles, and to apply to the company.

WE, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of Shares taken by Subscribers.
“ 1. John Jones of	in the county of	Merchant.	1
“ 2. John Smith of	in the county of	. .	5
“ 3. Thomas Green of	in the county of	. .	2
“ 4. John Thompson of	in the county of	. .	2
“ 5. Caleb White of	in the county of	. .	3
“ 6. Andrew Brown of	in the county of	. .	4
“ 7. Abel Brown of	in the county of	. .	1
Total shares taken			18

Dated the 22nd day of November, 1861.

Witness to the above signatures,

A.B., No. 20, Bond Street, Middlesex.

FORM F. (See § 21.)

APPENDIX V.

LICENCE TO HOLD LAND.

Form F.

The lords of the committee of privy council appointed for the consideration of matters relating to trade and foreign plantations hereby license the Association, Limited, to hold the lands hereunder described [*insert description of lands*]. The conditions of this licence are [*insert conditions, if any*].

THIRD SCHEDULE (see § 205).

FIRST PART.

Date and Chapter of Act.	Title of Act.	
21 & 22 Geo. 3, c. 46 . (Parliament of Ireland.)	An Act to promote Trade and Manufactures by regulating and encouraging partnerships.	Acts repealed.
7 & 8 Vict. c. 110 . .	An Act for the Registration, Incorporation, and Regulation of Joint-Stock Companies.	
7 & 8 Vict. c. 111 . .	An Act for facilitating the winding up the Affairs of Joint-Stock Companies unable to meet their pecuniary engagements.	
7 & 8 Vict. c. 113 . .	An Act to regulate Joint-Stock Banks in England.	
8 & 9 Vict. c. 98 . .	An Act for facilitating the winding up the Affairs of Joint-Stock Companies in Ireland unable to meet their pecuniary Engagements.	
9 & 10 Vict. c. 28 . .	An Act to facilitate the Dissolution of certain Railway Companies.	
9 & 10 Vict. c. 75 . .	An Act to regulate Joint-Stock Banks in Scotland and Ireland.	
10 & 11 Vict. c. 78 . .	An Act to amend an Act for the Registration, Incorporation, and Regulation of Joint-Stock Companies.	
11 & 12 Vict. c. 45 . .	An Act to amend the Acts for facilitating the winding up the affairs of Joint-Stock Companies unable to meet their pecuniary Engagements, and also to facilitate the Dissolution and winding up of Joint-Stock Companies and other Partnerships.	
12 & 13 Vict. c. 108 . .	An Act to amend the Joint-Stock Companies Winding-up Act, 1848.	
19 & 20 Vict. c. 47 . .	An Act for the Incorporation and Regulation of Joint-Stock Companies and other Associations.	
20 & 21 Vict. c. 14 . .	An Act to amend the Joint-Stock Companies Act, 1856.	
20 & 21 Vict. c. 49 . .	An Act to amend the Law relating to Banking Companies.	
20 & 21 Vict. c. 78 . .	An Act to amend the Act Seven and Eight Victoria, Chapter One hundred and eleven, for facilitating the winding up the Affairs of Joint-Stock Companies unable to meet their pecuniary Engagements, and also the Joint-Stock Companies Winding-up Acts, 1848 and 1849.	
20 & 21 Vict. c. 80 . .	An Act to amend the Joint-Stock Companies Act, 1856.	
21 & 22 Vict. c. 60 . .	An Act to amend the Joint-Stock Companies Acts, 1856 and 1857, and the Joint-Stock Banking Companies Act, 1857.	
21 & 22 Vict. c. 91 . .	An Act to enable Joint-Stock Banking Companies to be formed on the Principle of Limited Liability.	

APPENDIX V.

SECOND PART (a).

7 & 8 Vict. c. 113, s. 47.

Existing companies to have the powers of suing and being sued.

Every company of more than six persons established on the sixth day of May, one thousand eight hundred and forty-four, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from London, and not within the provisions of the act passed

Note on banking companies.

(a) The explanation of the Second Part of the Third Schedule to the foregoing statute, is as follows :

The 39 & 40 Geo. 3, c. 28, rendered all banking companies of more than six persons illegal, the Bank of England alone being excepted.

The 7 Geo. 4, c. 46, rendered banking companies of more than six persons legal, provided they did not carry on business within 65 miles of London. The same act also empowered the banking companies thus legalised to sue and be sued by public officers, upon certain conditions.

The 3 & 4 Wm. 4, c. 98, enabled banking companies of more than six persons to carry on business within 65 miles of London, subject to certain restrictions : but neither this act nor any other, prior to the 7 & 8 Vict., extended to these companies the privilege of suing and being sued by public officers, and which privilege was enjoyed under 7 Geo. 4, c. 46, by banking companies carrying on business more than 65 miles from London.

The 7 & 8 Vict. c. 113, § 47, which is above preserved from repeal, conferred the privilege in question upon banking companies of more than six members carrying on business within 65 miles of London, and established before the 6th of May, 1844.

This same act (7 & 8 Vict. c. 113) prohibited the formation after the 6th May, 1844, of banking companies of more than six persons, save under its provisions (§ 1). This act also authorised banking companies of more than six persons formed before the 6th of May, 1844, to obtain charters of incorporation, and so bring themselves within the provisions of the act (§ 45). Once within its provisions by incorporation, the privilege of suing and being sued by public officers

would, of course, be unnecessary ; and this accounts for the occurrence in the 47th section of 7 & 8 Vict. c. 113, of the words “and not within the provisions of this Act.”

With respect to the 20 & 21 Vict. c. 49, it must be borne in mind that when it passed, there were three kinds of banking partnerships and companies in existence, viz.—1. Ordinary banking firms of not more than six members ; 2. Banking companies of more than six members, formed before the 6th of May, 1844, but not incorporated ; and 3. Banking companies of more than six members, which, whether formed before or after the 6th May, 1844, were incorporated under the provisions of 7 & 8 Vict. c. 113. It must also be borne in mind that prior to the passing of the 20 & 21 Vict. c. 49, the privileges of banking partnerships and companies to issue notes, &c., depended partly upon whether they consisted of more than six members or not, and partly upon the distance from London at which they carried on their business. (See Vol. I. p. 184.) Such was the state of the law when the Joint-stock banking companies act, 1857, passed. That act (20 & 21 Vict. c. 49) did four things, viz.—1. It imperatively required all banking companies formed under 7 & 8 Vict. c. 113, to register (§ 4). 2. It repealed that act, not only with respect to banking companies formed after the 17th of August, 1857, but also with respect to all companies formed before that time under 7 & 8 Vict. c. 113, as soon as they should have registered as required. (See § 12.) 3. It prohibited the formation of banking companies of more than ten members, save under its own provisions (§ 13). 4. It conferred upon banking companies of not more than ten members

in the session holden in the seventh and eighth years of the reign of Her present Majesty, chapter one hundred and thirteen, shall have the same powers and privileges of suing and being sued in the name of any one of the public officers of such copartnership as the nominal plaintiff, petitioner, or defendant on behalf of such copartnership: and all judgments, decrees, and orders made and obtained in any such suit may be enforced in like manner as is provided with respect to such companies carrying on the said trade or business at any place in England exceeding the distance of sixty-five miles from London, under the provisions of an act passed in the seventh year of the reign of King George the fourth, chapter forty-six, intituled, "An act for the better regulating copartnerships of certain

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the privileges previously enjoyed by banking firms of not more than six members (§ 12). This last enactment it is which is preserved from repeal by the act of 1862.

The above observations will, it is hoped, enable the reader to understand without difficulty the object of saving from repeal the clauses in the 2nd part of the 3rd schedule to the Companies act, 1862.

A few additional remarks, however, are necessary to explain the varieties of banking companies which may be met with after that act has come into operation.

Until 1857 banking companies could not be formed by registration, and until the following year they could not be formed with limited liability, except by virtue of some special act of Parliament or royal charter. In 1857, however, an act was passed, authorising banking companies of more than six members to register (20 & 21 Vict. c. 49); and in 1858 another act was passed, authorising them to register with limited liability (21 & 22 Vict. c. 91). Companies actually registered under these acts are made subject to the provisions of the act of 1862 (see §§ 176, 177), which also authorises the formation of new banking companies of more than six members, with limited or unlimited liability (§ 6). Adding registered banking companies therefore to those which existed before 1857, the result will be as follows:

1. There may be ordinary banking partnerships of not more than ten members.

2. There may be companies of more than six members formed before the 6th

May, 1844, and empowered to sue and be sued by public officers, but not registered.

3. There may be registered companies of more than six members. Companies of this class may be limited or not, and may have been originally formed before or after May, 1844, and if after, then either under 7 & 8 Vict. c. 113, or under the Joint-stock companies acts of 1857—1858, or under the new act of 1862.

4. There may, perhaps, be yet another class, viz., companies formed before the 6th May, 1844, and subsequently incorporated by royal charter under 7 & 8 Vict. c. 113, § 46, but not registered under any of the later acts. Such a company might possibly be considered as not having been formed under 7 & 8 Vict. c. 113, within the meaning of 20 & 21 Vict. c. 49, § 4; and, if so, registration under this last act would not be compulsory, and if not compulsory under that act, it is not compulsory under the act of 1862. (See § 209.) If, however, the incorporation of the company by charter be considered as the formation of the company within the meaning of 20 & 21 Vict. c. 49, § 4, then the registration of the company is imperative, and the class under consideration cannot legally exist. The latter view the writer conceives to be correct.

In addition to the above four classes there, of course, may be banking companies formed under special acts or charters of their own.

With reference to Irish banks, it has been decided that the Irish act, 33 Geo. 2, c. 14, is repealed by the imperial act, 6 Geo. 4, c. 42. (See *O'Flaherty v. McDowell*, 6 Ho. Lo. Ca. 142.)

Note on banking companies.

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bankers in England, and for amending so much of an act of the thirty-ninth and fortieth years of the reign of His late Majesty King George the third, intituled 'An act for establishing an agreement with the governor and company of the Bank of England for advancing the sum of three millions towards the supply for the service of the year one thousand eight hundred,' as relates to the same," provided that such first-mentioned company shall make out and deliver from time to time to the commissioners of stamps and taxes the several accounts or returns required by the last-mentioned act, and all the provisions of the last-recited act as to such accounts or returns shall be taken to apply to the accounts or returns so made out and delivered by such first-mentioned companies as if they had been originally included in the provisions of the last-recited act.

20 & 21 Vict. c. 49, part of section 12.

Power to form
banking part-
nerships of ten
persons.

Notwithstanding anything contained in any act passed in the session holden in the seventh and eighth years of the reign of Her present Majesty, chapter one hundred and thirteen, and intituled "An act to regulate Joint-stock banks in England," or in any other act, it shall be lawful for any number of persons not exceeding ten to carry on in partnership the business of banking, in the same manner and upon the same conditions in all respects as any company of not more than six persons could before the passing of this act have carried on such business.

APPENDIX No. VI.

GENERAL ORDER AND RULES OF THE HIGH COURT OF CHANCERY
TO REGULATE THE MODE OF PROCEEDING UNDER THE COM-
PANIES ACT, 1862, ISSUED BY THE LORD HIGH CHANCELLOR,
TUESDAY, 11TH DAY OF NOVEMBER, 1862.

The right honourable Richard, Baron Westbury, Lord High Chancellor of Great Britain, with the advice and consent of the right honourable Sir John Romilly, Master of the Rolls, the honourable the Vice-Chancellor, Sir Richard Torin Kindersley, the honourable the Vice-Chancellor, Sir John Stuart, and the honourable the Vice-Chancellor, Sir William Page Wood, doth hereby, in pursuance and execution of the powers given by the statute 25th and 26th Victoria, chapter 89 (a), and of all other powers and authorities enabling him in that behalf, order and direct in manner following:—

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Petition to wind up company (b).

1. Every petition for the winding up of any company by the court, or subject to the supervision of the court, shall be intituled in the matter of "The Companies act, 1862," and of the company to which such petition shall relate, describing the company by its most usual style or firm.

2. Every such petition shall be advertised seven clear days before the hearing, as follows:—

- (1.) In the case of a company whose registered office, or if there shall be no such office, then whose principal, or last known principal place of business is or was situate within ten miles from Lincoln's Inn Hall, once in the "London Gazette," and once at least in two London daily morning newspapers.
- (2.) In the case of any other company, once in the "London Gazette," and once at least in two local newspapers circulating in the district where such registered office or principal or last known principal place of business, as the case may be, of such company is or was situate.

The advertisement shall state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (if any) (c).

3. Every such petition shall, unless presented by the company, be served at the registered office, if any, of the company, and if no registered office, then at the principal or last known principal place of business of

(a) See § 170.

(c) See the form of advertisement,

(b) See the act, §§ 82 and 148, and *infra*, in Schedule 3, No. 1.
ante, pp. 1242 *et seq.*

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the company, if any such can be found, upon any member, officer or servant of the company there, or in case no such member, officer, or servant can be found there, then by being left at such registered office or principal place of business, or by being served on such member or members of the company as the court may direct; and every petition for the winding up of a company subject to the supervision of the court, shall also be served upon the liquidator (if any) appointed for the purpose of winding up the affairs of the company.

4. Every petition for the winding up of any company by the court, or subject to the supervision of the court, shall be verified by an affidavit referring thereto, in the form or to the effect set forth in Form No. 2, in the third Schedule hereto; such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or in case the petition is presented by the company, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient *prima facie* evidence of the statements in the petition.

5. Every contributory or creditor of the company shall be entitled to be furnished, by the solicitor to the petitioner, with a copy of the petition, within twenty-four hours after requiring the same, on paying at the rate of fourpence per folio of seventy-two words for such copy.

Order to wind up company (d).

6. Every order for the winding up of a company by the court, or subject to its supervision (e), shall, within twelve days after the date thereof, be advertised by the petitioner once in the "London Gazette," and shall be served upon such persons (if any) and in such manner as the court may direct (f).

7. A copy of every order for winding up a company, certified to be a true copy thereof as passed and entered, shall be left by the petitioner at the chambers of the judge within ten days after the same shall have been passed and entered, and in default thereof any other person interested in the winding up may leave the same, and the judge may, if he thinks fit, give the carriage and prosecution of the order to such person. Upon such copy being left, a summons shall be taken out to proceed with the winding up of the company, and be served upon all parties who may have appeared upon the hearing of the petition. Upon the return of such summons, a time shall, if the judge thinks fit, be fixed for the appointment of an official liquidator, and for the proof of debts, and for the list of contributories to be brought in, and directions may be given as to the advertisements to be issued for all or any of such purposes, and generally as to the proceedings and the parties to attend thereon. The proceedings under the order shall be continued by adjournment, and, when necessary, by further summons, and any such direction as aforesaid may be given, added to, or varied, at any subsequent time, as may be found necessary.

(d) See the act, §§ 82, 85, 86, 147, Schedule 3, Nos. 3 and 4.
and *ante*, pp. 1260 *et seq.*

(f) See the form of advertisement in

(e) See the form of order, *infra*, *ib.* No. 5.

Official liquidator (g).

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8. The judge may appoint a person to the office of official liquidator, without previous advertisement, or notice to any party, or fix a time and place for the appointment of an official liquidator, and may appoint or reject any person nominated at such time and place, and appoint any person not so nominated.

9. When a time and place are fixed for the appointment of an official liquidator, such time and place shall be advertised in such manner as the judge shall direct, so that the first or only advertisement shall be published within fourteen days and not less than seven days before the day so fixed (*h*).

10. Every official liquidator shall give security by entering into a recognisance with two or more sufficient sureties in such sum as the judge may approve; and the judge may, if he shall think fit, accept the security of any guarantee society established by charter or act of Parliament in England, in lieu of the security of such sureties as aforesaid, or of any of them (*i*).

11. The official liquidator shall be appointed by order (*k*); and unless he shall have given security, a time shall be fixed by such order within which he is to do so; and the order shall fix the times or periods at which the official liquidator is to leave his accounts of his receipts and payments at the judge's chambers (*l*), and shall direct that all moneys to be received shall be paid into the Bank of England, immediately after the receipt thereof, to the account of the official liquidator of the company, and an account shall be opened there accordingly; and an office copy of the order shall be lodged at the Bank of England (*m*).

12. When an official liquidator has given security pursuant to the directions in the order appointing him, the same shall be certified by the chief clerk, as in the case of a receiver appointed in a cause subject to giving security.

13. The official liquidator shall, on each occasion of passing his account (*n*), and also whensoever the judge may so require, satisfy the judge that his sureties are living, and resident in Great Britain, and have not been adjudged bankrupt or become insolvent, and in default thereof he may be required to enter into fresh security within such time as shall be directed.

14. Every appointment of an official liquidator shall be advertised in such manner as the judge shall direct, immediately after he has been appointed, and has given security (*o*).

15. Where it is desired to appoint provisionally an official liquidator (*p*)

(*g*) See the act, §§ 85, 92, 93, 103, 104, and *ante*, pp. 1271 *et seq.*

(*h*) See the form of advertisement, *infra*, Schedule 3, No. 6, and the form of proposal for the appointment of the official liquidator, *ib.* No. 7.

(*i*) See the form of recognisance and affidavit of sureties, *ib.* Nos. 9 and 10.

(*k*) See the form of order, *ib.* Nos. 8 and 9.

(*l*) See rule 19.

(*m*) See further, as to accounts in the Bank of England, rules 36—44; and for the form of direction to open an account there, see Schedule 3, No. 14.

(*n*) See rule 19.

(*o*) See the form of advertisement, in Schedule 3, No. 15.

(*p*) See the form of order appointing a provisional official liquidator in Schedule

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an application for that purpose may, at any time after the presentation of the petition for winding up the company, be made by summons, without advertisement or notice to any person, unless the judge shall otherwise direct; and such provisional official liquidator may, if the judge shall think fit, be appointed without security.

16. In case of the death, removal, or resignation of an official liquidator, another shall be appointed in his room, in the same manner as directed in the case of a first appointment, and the proceedings for that purpose may be taken by such party interested as may be authorised by the judge to take the same.

17. The official liquidator shall, with all convenient speed after he is appointed, proceed to make up, continue, complete, and rectify the books of account of the company; and shall provide and keep such books of account as shall be necessary, or as the judge may direct, for the purposes aforesaid, and for showing the debts and credits of the company, including a ledger, which shall contain the separate accounts of the contributories, and in which every contributory shall be debited from time to time with the amount payable by him in respect of any call to be made as provided by the said act and these rules.

18. The official liquidator shall be allowed in his accounts, or otherwise paid, such salary or remuneration as the judge may from time to time direct, including any necessary employment of assistants or clerks by the official liquidator, to which regard shall be had; and such salary or remuneration may either be fixed at the time of his appointment, or at any time thereafter, as the judge may think fit. Every allowance of such salary or remuneration, unless made at the time of his appointment, or upon passing an account, shall be made upon application for that purpose by the official liquidator, on notice to such person (if any), and supported by such evidence as the judge shall require; nevertheless the judge may from time to time allow any sum he may think fit to the official liquidator, on account of the salary or remuneration to be thereafter allowed.

19. The accounts of the official liquidator shall be left at the judge's chambers at the times directed by the order appointing him, and at such other times as may from time to time be required by the judge, and such accounts shall, upon notice to such parties (if any) as the judge shall direct, be passed and verified in the same manner as receivers' accounts.

Proof of debts (q).

20. For the purpose of ascertaining the debts and claims due from the company, and of requiring the creditors to come in and prove their debts or claims, an advertisement shall be issued at such time as the judge shall direct; and such advertisement shall fix a time for the creditors to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any), to the official liquidator, and appoint a day for adjudicating thereon (r).

21. The creditors need not attend upon the adjudication, nor prove their debts or claims, unless they are required to do so by notice from the

3, No. 9; and see further, as to him,
§§ 85 and 92 of the act, and *infra*,
rule 59.

ante, pp. 1279 *et seq.*

(r) See the form of advertisement,
infra, Schedule 3, No. 16.

(q) See the act, §§ 107, 158, and

official liquidator; but upon such notice being given, they are to come in and prove their debts or claims within a time to be therein specified.

22. The official liquidator shall investigate the debts and claims sent in to him, and ascertain, so far as he is able, which of such debts and claims are justly due from the company; and he shall make out and leave at the chambers of the judge, a list of all the debts and claims sent in to him, distinguishing which of the debts and claims, or parts of debts and claims so claimed, are, in his opinion, justly due and proper to be allowed without further evidence, and which of them, in his opinion, ought to be proved by the creditors; and he shall make and file, prior to the time appointed for adjudication, an affidavit, setting forth which of the debts and claims in his opinion are justly due and proper to be allowed without further evidence, and stating his belief that such debts and claims are justly due and proper to be allowed, and the reasons for such belief (*s*).

23. At the time appointed for adjudication upon the debts and claims, or at any adjournment thereof, the judge may either allow the debts and claims upon the affidavit of the official liquidator, or may require the same, or any of them, to be proved by the claimants, and adjourn the adjudication thereon to a time to be then fixed; and the official liquidator shall give notice to the creditors whose debts or claims have been so allowed, of such allowance (*t*).

24. The official liquidator shall give notice to the creditors whose debts or claims have not been allowed upon his affidavit, that they are required to come in and prove the same by a day to be therein named, being not less than four days after such notice, and to attend at a time to be therein named, being the time appointed by the advertisement, or by adjournment (as the case may be) for adjudicating upon such debts and claims (*u*).

25. The value of such debts and claims as are made admissible to proof by the 158th section of the said act, shall, so far as is possible, be estimated according to the value thereof at the date of the order to wind up the company.

26. Interest on such debts and claims as shall be allowed shall be computed, as to such of them as carry interest, after the rate they respectively carry; any creditor whose debt or claim so allowed does not carry interest, shall be entitled to interest, after the rate of 4*l.* per centum per annum, from the date of the order to wind up the company, out of any assets which may remain after satisfying the costs of the winding up, the debts and claims established, and the interest of such debts and claims as by law carry interest.

27. Such creditors as come in and prove their debts or claims pursuant to notice from the official liquidator, shall be allowed their costs of proof, in the same manner as in the case of debts proved in a cause.

28. The result of the adjudication upon debts and claims shall be stated in a certificate to be made by the chief clerk, and certificates as to any of such debts and claims may be made from time to time. All such certificates shall state whether the debts or claims are allowed or disallowed,

(*s*) See the form of affidavit, *ib.* Nos. 17 and 18.

(*t*) See the form of notice, *ib.* No. 19; and the form of notice to attend and be paid, *ib.* No. 23.

(*u*) See the form of notice, *ib.* No. 20; and the form of affidavit to be made by a creditor who has received such notice, *ib.* No. 21.

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List of contributories (y).

29. The official liquidator shall, with all convenient speed after his appointment, or at such time as the judge shall direct, make out and leave at the chambers of the judge a list of the contributories of the company; and such list shall be verified by the affidavit of the official liquidator, and shall, so far as is practicable, state the respective addresses of, and the number of shares or extent of interest to be attributed to each such contributory, and distinguish the several classes of contributories. And such list may from time to time, by leave of the judge, be varied or added to, by the official liquidator (z).

30. Upon the list of contributories being left at the chambers of the judge, the official liquidator shall obtain an appointment for the judge to settle the same, and shall give notice in writing of such appointment to every person included in such list, and stating in what character, and for what number of shares or interest such person is included in the list; and in case any variation or addition to such list shall at any time be made by the official liquidator, a similar notice in writing shall be given to every person to whom such variation or addition applies. All such notices shall be served four clear days before the day appointed to settle such list, or such variation or addition (a).

31. The result of the settlement of the list of contributories shall be stated in a certificate by the chief clerk; and certificates may be made from time to time for the purpose of stating the result of such settlement down to any particular time, or as to any particular person, or stating any variation of the list (b).

Sales of property (c).

32. Any real or personal property belonging to the company may be sold, with the approbation of the judge, in the same manner as in the case of a sale under a decree or order of the Court in a suit, or, if the judge shall so direct, by the official liquidator; and upon any such sale by the official liquidator, the conditions or contracts of sale shall be settled and approved of by the judge, unless he shall otherwise direct; and the judge may, if he thinks fit, direct such conditions and contracts, and the abstract of the title to the property, to be submitted to one of the conveyancing counsel of the Court, under the 2nd of the consolidated general orders, and may, on any sale by public auction, fix a reserved bidding; and, unless on account of the small amount of the purchase-moneys or other cause, it shall, having regard to the amount of the security given by the official liquidator, be thought proper that the purchase-moneys

(x) See the form of certificate, *ib.* No. 22; and the form of notice to a creditor to attend and be paid, *ib.* No. 23.

(y) See the act, §§ 98 and 99, and *ante*, pp. 1289 *et seq.*

(z) See the forms of the list, *infra*, Schedule 3, Nos. 25, 29, and 30; and the form of the affidavit in support, *ib.* Nos. 24 and 29; and the form of order

varying the list, *ib.* No. 32.

(a) See the form of notice, *ib.* No. 26; and of the affidavit of service, No. 27.

(b) See the form of certificate, *ib.* No. 31.

(c) See the act, §§ 94, 95, 103, and *ante*, p. 1275.

shall be paid to him, all conditions and contracts of sale shall provide that the purchase-moneys shall be paid by the respective purchasers into the Bank of England, to the account of the official liquidator of the company.

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Calls (d).

33. Every application to the judge to make any call on the contributories, or any of them, for any purpose authorised by the said act, shall be made by summons, stating the proposed amount of such call; and such summons shall be served four clear days at the least before the day appointed for making the call on every contributory proposed to be included in such call; or, if the judge shall so direct, notice of such intended call may be given by advertisement (e).

34. When any order for a call has been made, a copy thereof shall be forthwith served upon each of the contributories included in such call, together with a notice from the official liquidator specifying the amount or balance due from such contributory (having regard to the provisions of the said act) in respect of such call; but such order need not be advertised unless, for any special reason, the judge shall so direct (f).

35. At the time of making an order for a call, the further proceedings relating thereto shall be adjourned to a time subsequent to the day appointed for the payment thereof, and afterwards from time to time so long as may be necessary; and at the time appointed by any such adjournment, or upon a summons to enforce payment of the call, duly served, and upon proof of the service of the order and notice of the amount due, and non-payment, an order (g) may be made for such of the contributories who have made default, or of such of them against whom it shall be thought proper to make such order, to pay the sum which by such former order and notice they were respectively required to pay, or any less sum which may appear to be due from them respectively.

Payment in of moneys and deposit of securities (h).

36. If any official liquidator shall not pay all the moneys received by him into the Bank of England (i), to the account of the official liquidator of the company, within seven days next after the receipt thereof, unless the judge shall have otherwise directed, such official liquidator shall be charged in his account with ten shillings for every 100*l.*, and a proportionate sum for any larger amount, retained in his hands beyond such period, for every seven days during which the same shall have been so retained, and the judge may, for any such retention, disallow the salary or remuneration of such official liquidator.

37. All bills, notes, and other securities payable to the company or to the official liquidator thereof shall, as soon as they shall come to the hands

(d) See the act, §§ 102 and 120, and *ante*, pp. 1390 *et seq.*

(e) See the forms of the summons, the affidavit in support of it, and the advertisement, *infra*, Schedule 3, Nos. 33—35.

(f) See the forms of the order and the notice, *ib.* Nos. 36—37.

(g) See the forms of this order and

of the affidavit on which to obtain it, *ib.* Nos. 38 and 39; and see the form of affidavit of service of this order, *ib.* No. 42.

(h) See the act, §§ 103, 104, and *ante*, p. 1272.

(i) See form of direction to open account, *infra*, Schedule 3, No. 14.

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of such official liquidator, be deposited by him in the Bank of England for the purpose of being presented by the bank for acceptance and payment, or for payment only, as the case may be.

38. All orders for payment of calls, balances, or other moneys due from any contributory or other person, shall direct the same to be paid into the Bank of England, to the account of the official liquidator of the company, unless, on account of the smallness of the amount or other cause, it shall, having regard to the amount of the security given by the official liquidator, be thought proper to direct payment thereof to the official liquidator. Provided that where any such order has been made directing payment of a specific sum into the Bank of England, in case it shall be thought proper for the purpose of enabling the official liquidator to issue execution or take other proceedings to enforce the payment thereof, or for any other reason, an order may, either before service of such former order, or after the time thereby fixed for payment, be made, without notice, for payment of the same sum to the official liquidator.

39. At the time of the service of any order for payment into the Bank of England, the official liquidator shall give to the party served a notice, to the purport or effect set forth in form No. 40 in the third schedule hereto, for the purpose of informing him how the payment is to be made; and before the time fixed for such payment the official liquidator shall furnish the cashier of the Bank of England with a certificate, to the purport or effect set forth in form No. 41 in the third schedule hereto, to be signed by such cashier, and delivered to the party paying in the money therein mentioned.

40. For the purpose of enforcing any order for payment of money into the Bank of England an affidavit of the official liquidator, to the purport or effect set forth in form No. 43, in the third schedule hereto, shall be sufficient evidence of the non-payment thereof.

41. All moneys, bills, notes, and other securities paid and delivered into the Bank of England, shall be placed to the credit of the account of the official liquidator of the company; and orders for any such payment and delivery shall direct the same accordingly.

Delivery out of securities, and payment out and investment of moneys (k).

42. All bills, notes, and other securities delivered into the Bank of England, shall be delivered out upon a request signed by the official liquidator, and countersigned by the chief clerk of the judge; and moneys placed to the account of the official liquidator shall be paid out upon cheques or orders, signed by the official liquidator, and countersigned by the chief clerk of the judge.

43. All or any part of the money for the time being standing to the credit of the account of the official liquidator at the Bank of England, and not immediately required for the purposes of the winding up, may be invested in the purchase of Bank 3*l.* per cent. Annuities, Reduced 3*l.* per cent. Annuities, New 3*l.* per cent. Annuities, or New 2*l.* 10*s.* per cent. Annuities, in the name of the official liquidator, or in the purchase of exchequer bills. All such investments shall be made by the Bank of

(k) See the act, §§ 103, 104.

England, upon a request signed by the official liquidator, and countersigned by the chief clerk of the judge, and which request shall be a sufficient authority for debiting the account with the purchase-money; and such exchequer bills, and in case of an exchange thereof any new exchequer bills, shall be retained by or deposited with the Bank of England, in the name and on behalf of the official liquidator: and such annuities or exchequer bills shall not afterwards be sold or transferred or otherwise dealt with except upon a direction for that purpose, signed by the official liquidator, and countersigned by the chief clerk of the judge, or under an order to be made by the judge (*l*).

44. All dividends and interest to accrue due upon any such annuities, shall from time to time be received by the Bank of England, under a power of attorney to be executed by the official liquidator, and placed to the credit of the account of such official liquidator; and such of the exchequer bills as shall from time to time be in course of payment, shall be delivered by the Bank of England to one of their cashiers, who is to receive the interest due thereon, and exchange the same for new bills, in case such new bills are issued, or otherwise to receive the principal and interest due on such of the said bills, so in course of payment, as cannot be exchanged, and pay the said interest, or principal and interest, as the case may be, into the Bank of England to the credit of the account of the official liquidator of the company.

Meetings of creditors or contributories (m).

45. When the judge shall direct a meeting of the creditors or contributories of the company to be summoned under the 91st or 149th section of the said act, the official liquidator shall give notice in writing, seven clear days before the day appointed for such meeting, to every creditor or contributory, of the time and place appointed for such meeting, and of the matter upon which the judge desires to ascertain the wishes of the creditors or contributories; or, if the judge shall so direct, such notice shall be given by advertisement, in which case the object of the meeting need not be stated, and it shall not be necessary to insert such advertisement in the "London Gazette" (*n*).

46. The votes of the creditors or contributories of the company at any meeting summoned by the direction of the judge, may be given either personally or by proxy; but no creditor shall appoint a proxy who is not a creditor of the company whose debt or claim has been allowed, and no contributory shall appoint a proxy who is not a contributory of the company (*o*).

47. The direction of the judge for any meeting of creditors or contributories under the 91st or 149th section of the said act, and the appointment of a person to act as chairman of any such meeting, shall be testified by a memorandum signed by the chief clerk of the judge (*p*).

(*l*) See the form of request to invest, *infra*, Schedule 3, No. 54.

(*m*) See the act, §§ 91 and 149.

(*n*) See the form of notice or advertisement, *infra*, Schedule 3, No. 45.

(*o*) See the form of appointment of

proxy, *ib.* No. 46. As to the stamp, see *ante*, p. 205, note (*f*).

(*p*) See the form of this memorandum, Schedule 3, No. 47; and for the form of the chairman's report of the result of the meeting, see *ib.* No. 48.

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Direction or sanction of the judge (q).

48. The sanction of the judge to the drawing, accepting, making, and indorsing of any bill of exchange or promissory note by any official liquidator, shall be testified by a memorandum on such bill of exchange or promissory note, signed by the chief clerk of the judge (*r*).

49. Every application for the sanction of the judge to a compromise with any contributory or other person indebted to the company, shall be supported by the affidavit of the official liquidator that he has investigated the affairs of such contributory or person, and stating his belief that the proposed compromise will be beneficial to the company, and his reasons for such belief; and the sanction of the judge thereto shall be testified by a memorandum, signed by the chief clerk of the judge, on the agreement of compromise, unless any party shall desire to appeal from the decision of the judge, in which case an order shall be drawn up for that purpose (*s*).

50. The direction or sanction of the judge for any other proceeding or act to be taken or done by the official liquidator, shall be obtained upon summons, and an order shall be drawn up thereon, unless the judge shall otherwise direct (*t*).

Applications to the court or judge under §§ 137, 138, 141, 167, and 168 of the act.

51. Every application under the 137th, 138th, or 141st section of the said act shall be made by petition or motion, or, if the judge shall so direct, by summons at chambers: and every application under the 167th or 168th section of the said act shall be made by petition (*u*).

Orders.

52. All orders made in chambers shall be drawn up in chambers, unless specially directed to be drawn up by the registrar, and shall be entered in the same manner, and in the same office, as other orders made in chambers (*x*).

Advertisements.

53. When an advertisement is required for any purpose, except where otherwise directed by these rules, the advertisement shall be inserted once in the "London Gazette," and in such other newspaper or newspapers, and for such number of times as may be directed. The judge may, in such cases as he shall think fit, dispense with any advertisement required by these rules (*y*).

(*q*) See the act, §§ 95, 159, 160, and *infra*, rule 74.

(*r*) See the form of memorandum, *infra*, Schedule 3, No. 49.

(*s*) See the forms of an agreement to compromise; and of the memorandum sanctioning it, *ib.* Nos. 50 and 51.

(*t*) See the form of order, *ib.* No. 52.

(*u*) § 137 relates to appeals against

arrangements with creditors: § 138 relates to applications by liquidators in a voluntary winding up: § 141 relates to the appointment of liquidators in a voluntary winding up: and §§ 167 and 168 relate to the prosecution of delinquent directors, &c.

(*x*) See *infra*, rule 74.

(*y*) See *infra*, rules 73 and 74.

Admission of documents.

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54. Any party to any proceeding in court or chambers relating to the winding up of a company may, by notice in writing in the Form No. 6, in schedule N. to the Consolidated general orders, or to the like effect, call on any other party therein competent to admit the same, to admit any document, saving all just exceptions; and in case of refusal or neglect so to admit, the costs of proving such document shall be paid by the party so refusing or neglecting, unless the judge shall be of opinion that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice shall have been given, except in cases where the omission to give such notice has been, in the opinion of the taxing master, a saving of expense.

Affidavits (z).

55. Where an order shall have been made for the winding up of any company, any person intending to use any affidavit in any proceeding under such order, shall file the same in the Record and Writ Clerks' office, and give notice thereof to the official liquidator. The person, other than the official liquidator, filing the affidavit, shall not be required to take an office copy thereof, but an office copy thereof shall be taken by the official liquidator, and he shall produce the same at the hearing of any application or proceeding upon which it is intended to be used, unless the judge shall otherwise direct.

Certificate of chief clerk (a).

56. The 48th, 49th, 50th, 51st, 52nd and 55th rules of the 35th of the Consolidated general orders, shall apply to all certificates of the chief clerk in the matter of the winding up of any company; nevertheless, certificates on passing the official liquidator's accounts may be approved and signed by the judge without delay, and upon being so signed, shall be filed and forthwith acted upon (b).

Register and file of proceedings.

57. A register shall be kept of all proceedings in the judge's chambers, in each matter, in the same manner as required by the 57th rule of the 35th of the Consolidated general orders, and no documents or proceedings are to be filed in the judge's chambers, unless the judge shall otherwise direct.

(z) See *infra*, rule 74.

(a) See *infra*, rule 74.

(b) These rules relate to the practice respecting certificates, and the time for obtaining a review of a certificate, as well before as after it has been signed by the judge. The time for obtaining a summons to take the opinion of the judge on a certificate not signed by him is four

clear days after its signature by the chief clerk; and the time for applying by summons or motion to discharge or vary a certificate signed and adopted by the judge, is eight clear days after the filing of the certificate. But the judge has power to enlarge these times; see *infra*, rule 73.

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58. All orders, exhibits, admissions, memorandums, and office copies of affidavits, examinations, depositions, and certificates, and all other documents relating to the winding up of any company, shall be filed by the official liquidator, as far as may be, in one continuous file, and such file shall be kept by him, or otherwise, as the judge may from time to time direct. Every contributory of the company, and every creditor thereof whose debt or claim has been allowed, shall be entitled, at all reasonable times to inspect such file free of charge, and, at his own expense, to take copies or extracts from any of the documents comprised therein, or to be furnished with such copies or extracts at a rate not exceeding three-halfpence per folio of seventy-two words; and such file shall be produced in court, or before the judge, and otherwise, as occasion may require (c).

Provisional official liquidators.

59. All the above rules relating to official liquidators shall, so far as the same are applicable, and subject to the directions of the judge in each case, apply to provisional official liquidators (d).

Attendance and appearance of parties (e).

60. Every person, for the time being, on the list of contributories of the company, left at the chambers of the judge by the official liquidator, and every person having a debt or claim against the company, allowed by the judge, shall be at liberty, at his own expense, to attend the proceedings before the judge, and shall be entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he shall by written request desire to have notice of; but if the judge shall be of opinion that the attendance of any such person upon any proceeding has occasioned any additional costs which ought not to be borne by the funds of the company, he may direct such costs, or a gross sum in lieu thereof, to be paid by such person: and such person shall not be entitled to attend any further proceedings until he has paid the same.

61. The judge may from time to time appoint any one or more of the contributories, or creditors, as he thinks fit, to represent before him, at the expense of the company, all or any class of the contributories or creditors, upon any question as to a compromise with any of the contributories or creditors, or in and about any other proceedings before him relating to the winding up of the company, and may remove the person or persons so appointed. In case more than one person shall be so appointed, they shall unite in employing the same solicitor to represent them.

62. No contributory or creditor shall be entitled to attend any proceedings at the chambers of the judge, unless and until he has entered in a book to be kept there for that purpose his name and address, and the name and address of his solicitor (if any), and upon any change of his address or of his solicitor, his new address, and the name and address of his new solicitor (f).

(c) See the act, § 156, and *ante*, *infra*, rule 74.
p. 1272.

(d) See *ante*, rule 15.

(e) See the act, §§ 74, 159, 160, and

(f) See the form of this book, Schedule 3, No. 53.

Services of summonses, notices, &c. (g).

63. Services upon contributories and creditors shall be effected (except when personal service is required) by sending the notice, or a copy of the summons or order or other proceeding, through the post in a pre-paid letter, addressed to the solicitor of the party to be served (if any) or otherwise to the party himself at the address entered or last entered pursuant to the preceding rule; or if no such entry has been made, then, if a contributory, to his last known address or place of abode; and if a creditor, to the address given by him, pursuant to the foregoing rule 20; and such notice, or copy summons, order, or other proceeding, shall be considered as served at the time the same ought to be delivered in the due course of delivery by the post-office, and notwithstanding the same may be returned by the post-office.

64. No service under these rules shall be deemed invalid by reason that the Christian name, or any of the Christian names, of the person on whom service is sought to be made has been omitted, or designated by initial letters, in the list of contributories, or in the summons, order, notice, or other document wherein the name of such contributory or creditor is contained, provided the judge is satisfied that such service is in other respects sufficient.

Termination of winding up (h).

65. Upon the termination of the proceedings in chambers for the winding up of any company, a balance-sheet shall be brought in by the official liquidator of his receipts and payments, and verified by his affidavit; and the official liquidator shall pass his final account, and the balance (if any) due thereon shall be certified. And upon payment of such balance, in such manner as the Court or judge shall direct, the recognizance entered into by the official liquidator and his sureties may be vacated.

66. When the official liquidator has passed his final account, and the balance (if any) certified to be due thereon has been paid in such manner as the judge shall direct, a certificate shall be made by the chief clerk that the affairs of the company have been completely wound up (i); and, in case the company has not been already dissolved, the official liquidator shall, immediately after such certificate has become binding, apply to the judge for an order that the company be dissolved from the date of such order (k).

67. When the proceedings for winding up any company have been completed, the file of proceedings and the book containing the official liquidator's account, shall be deposited in the record and writ clerk's office.

Duties of solicitor of official liquidator (l).

68. The solicitor of the official liquidator shall conduct all such proceedings as are ordinarily conducted by solicitors of the Court; and where the attendance of his solicitor is required on any proceeding in

(g) See the act, §§ 62 and 63, and 3, No. 55.
infra, rule 74.

(h) See the act, §§ 111—113.

(i) See the form of certificate, Schedule

(k) See the form of order, *ib.* No. 56.

(l) See the act, § 97, and *infra*, Schedule 3, Form No. 12.

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court or chambers, the official liquidator need not attend in person, except in cases where his presence is necessary in addition to that of his solicitor, or the judge shall direct him to attend.

Forms.

69. The forms set forth or referred to in the third schedule to these orders, with such variations as the circumstances of each case may require, may be used for the respective purposes mentioned in such schedule.

Fees.

70. Solicitors shall be entitled to charge, and be allowed, the fees set forth and referred to in the first schedule hereto, unless the Court or judge shall otherwise specially direct.

71. The fees of court set forth and referred to in the second schedule hereto shall be paid in relation to proceedings in the Court of Chancery under the Companies act, 1862, and shall be collected by means of stamps, in the manner prescribed by the 39th of the Consolidated General Orders.

Taxation of costs.

72. Where an order is made in court or chambers for payment of any costs, the order shall direct the taxation thereof by the taxing-master; except in cases where a gross sum in lieu of taxed costs is fixed by the order, in accordance with the 37th rule of the 40th of the Consolidated General Orders.

Power of judge (m).

73. The power of the Court, and of the judge sitting in chambers, to enlarge or abridge the time for doing any act, or taking any proceeding, to adjourn or review any proceeding, and to give any direction as to the course of proceeding, is unaffected by these rules.

General directions (n).

74. The general practice of the Court, including the course of proceeding and practice at the judges' chambers, as provided by the statute 15th and 16th Victoria, chapter 80, and the general orders of the Court relative thereto, shall, in cases not provided for by the Companies act, 1862, or these rules, and so far as the same are applicable and not inconsistent with the said act or these rules, apply to all proceedings for winding up a company.

Application of rules.

75. These rules apply only to proceedings under the Companies act, 1862.

(m) See the act, §§ 83, 119, and 204, 37, rule 17.
and as to the power of enlarging time,
Cons. Ord. 35, rule 62, and Cons. Ord.

(n) See the act, § 170, and *ante*, p. 1260.

Commencement of rules.

76. These rules shall take effect and come into operation on and after the 25th day of November, 1862.

Interpretation.

77. The 1st rule of the 23rd of the Consolidated General Orders, and the general interpretation clause therein, shall be deemed to extend and apply to the rules of this order; and such rules shall have the effect of and be deemed to be general orders of the Court.

WESTBURY, C.
JOHN ROMILLY, M. R.
RICHD. T. KINDERSLEY, V.-C.
JOHN STUART, V.-C.
W. P. WOOD, V.-C.

THE FIRST SCHEDULE.

FEES AND CHARGES TO BE ALLOWED TO SOLICITORS.

	£	s.	d.
For preparing and drawing up every order made at chambers, and attending for same, and at the registrar's office to get same entered	0	13	4
For engrossing every order, in addition to the above fee, per folio	0	0	4
For other duties performed, such of the fees on the higher scale authorised by the 2nd rule of the 38th of the Consolidated General Orders, and the regulations as to solicitors' fees subjoined thereto, as are applicable; except that the special fee allowed on creditors' claims is not to apply.			
Where, under such regulations, a fee of 3 guineas may be allowed for attending any summons or other appointment at the judge's chambers, the same may be increased to any sum not exceeding 5 guineas.			
The fee of 2s. 6d. allowed by such regulations for notices and services shall be reduced to 1s. 6d., where the service may be effected as provided by the above rule 63.			
The usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing and amount to more than 3l.			

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THE SECOND SCHEDULE.

FEES TO BE COLLECTED BY MEANS OF STAMPS.

In the judges' chambers.

	£	s.	d.
For every summons	0	3	0
For every order drawn up by the chief clerk	0	5	0
For every advertisement	1	0	0
For every certificate	0	5	0
For every oath, affirmation, declaration, or attestation upon honour	0	1	6

In the registrars' office.

For every order made in court	1	0	0
For every order made in chambers	0	5	0
For every office copy of an order	0	5	0

In the examiners' office.

The same fees as those directed to be paid and collected in such office by the 2nd rule of the 39th of the Consolidated General Orders, and the regulations subjoined thereto.

In the record and writ clerks' office, and report office.

Such of the fees directed to be paid and collected in such office by the 2nd rule of the 39th of the Consolidated General Orders, and the regulations subjoined thereto, as are applicable.

In the taxing masters' office.

The same fees as those directed to be paid and collected by the 2nd rule of the 39th of the Consolidated General Orders, and the regulations subjoined thereto.

In the office of the Lord Chancellor's principal secretary.

For every petition	1	0	0
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In the office of the secretary at the rolls.

For every petition	1	0	0
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THE THIRD SCHEDULE.

FORMS.

No. 1. *Advertisement of petition.* [Rule 2.]

In the matter of the Companies act, 1862; and of the company.

Notice is hereby given, that a petition for the winding up of the above named company by the Court [*or*, subject to the supervision of the Court] of Chancery was, on the day of , 186 , presented to the Lord Chancellor [*or*, the Master of the Rolls] by the said company [*or*, by

A. B., of , a creditor [*or, contributory*] of the said company] [*or, as the case may be*]. And that the said petition is directed to be heard before the Vice-Chancellor [*or, Master of the Rolls*] on the day of , 186 ; and any creditor or contributory of the said company desirous to oppose the making of an order for the winding up of the said company under the above act, should appear at the time of hearing by himself or his counsel for that purpose, and a copy of the petition will be furnished to any creditor or contributory of the said company requiring the same, by the undersigned, on payment of the regulated charge for the same.

C. and D., of &c. [*Agents for E. and F., of &c.*]

Solicitors for the petitioner.

No. 2. *Affidavit verifying petition.* [Rule 4.]

In Chancery.

In the matter, &c.

I, A. B., of &c., make oath and say, that such of the statements in the petition now produced and shown to me, and marked with the letter A., as relate to my own acts and deeds are true, and such of the said statements as relate to the acts and deeds of any other person or persons, I believe to be true.

No. 3. *Order for winding up by the court.* [25 & 26 Vict. c. 89, ss. 81, 82.]

The Master of the Rolls } day, the day of 186 .
[*or, Vice-Chancellor* } In the matter, &c.
].

Upon the petition of the above-named company [*or, A. B., of &c., a creditor [or contributory] of the above-named company*] on the day of 186 , preferred unto the Right Honourable the Lord High Chancellor of Great Britain [*or, Master of the Rolls*], and upon hearing counsel for the petitioner, and for , and upon reading the said petition, an affidavit of (the said petitioner) filed, &c., verifying the said petition, an affidavit of L. M., filed the day of 186 , the "London Gazette" of the day of , the "Times" newspaper of the day of [*enter any other papers*] each containing an advertisement of the said petition [*enter any other evidence*], his Honor [*or, this court*] doth order that the said company be wound up by this court, under the provisions of the Companies act, 1862.

No. 4. *Order for winding up, subject to supervision.* [25 & 26 Vict. c. 89, ss. 147, 148.]

The Master of the Rolls } day, the of 186 .
[*or, Vice-Chancellor* } In the matter, &c.
].

Upon the petition, &c., his Honor [*or, this court*] doth order, that the voluntary winding up of the said company be continued, but subject to the supervision of this court; and any of the proceedings under the said voluntary winding up may be adopted as the judge shall think fit. And the creditors, contributories, and liquidators of the said com-

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pany, and all other persons interested, are to be at liberty to apply to the judge at chambers as there may be occasion.

No. 5. *Advertisement of order to wind up.* [Rule 6.]

In the matter, &c.

By an order made by the Master of the Rolls [*or*, the Vice-Chancellor] in the above matter, dated the day of , 186 , on the petition of the above-named company [*or*, A. B., of], it was ordered that, &c. [*as in order*].

C. & D., of &c.,
Solicitors for the said petitioner.

No. 6. *Advertisement of time and place fixed for the appointment of official liquidator.* [Rule 9.]

In the matter, &c.

Notice is hereby given, that the Master of the Rolls [*or*, the Vice-Chancellor] has fixed the day of , 186 , at o'clock in the noon, at his chambers in the Rolls Yard, Chancery Lane [*or*, at No. Lincoln's Inn], in the county of Middlesex, as the time and place for the appointment of an official liquidator of the above-named company.

G. H.,
Chief Clerk.

No. 7. *Proposal for appointment of official liquidator (and sureties) where form No. 6 has been issued.*

In the matter, &c.

We, the undersigned contributories of the above-named company for the number of shares placed opposite our respective names, hereby propose Mr. W. T., of &c., public accountant, to be the official liquidator of the said company [and H. N., of &c., and J. P., of &c., to be his sureties].

Name.	Address.	Number of Shares held.

No. 8. *Order appointing an official liquidator.* [Rules 10, 11.]

Master of the Rolls [*or*,
Vice-Chancellor], the day of , 186 .
at chambers.]

In the matter, &c.

Upon the application, &c., and upon reading, &c., the judge doth hereby appoint R. P. H., of &c., official liquidator of the above-named company [*if security has not been given, add*, And it is ordered that the said R. P. H. do, on or before the day of next, give security to be approved of by the judge]. And it is ordered that the said R. P. H. do, on the day of , and day of 186 , and the same days in each succeeding year, leave his accounts at the chambers of the said judge. And it is ordered that all moneys to

Master of the Rolls [or,
Vice-Chancellor
] } , the day of , 186 .
at chambers. } In the matter, &c.

No. 10. *Recognizance of the official liquidator and sureties.* [Rule 10.]

186 .

In the matter, &c.
The Master of the Rolls [*or*, Vice-Chancellor
and allowed this recognizance.

G. H.,
Chief Clerk.

R. P. H., of &c., W. B., of &c., and T. P., of &c., before our sovereign lady the Queen in her High Court of Chancery personally appearing, do acknowledge themselves, and every of them doth acknowledge himself, to owe to the Right Honourable Sir John Romilly, Knight, the Master of the Rolls, and the Honourable Sir Richard Torin Kindersley, Knight, the senior Vice-Chancellor of the said court, the respective sums of lawful money of Great Britain set opposite to their respective names in the schedule hereto, to be paid to the said Sir John Romilly and Sir Richard Torin Kindersley, or one of them, or the executors or administrators of them, or one of them: and in default of payment of the said sums, the said R. P. H., W. B., and T. P., are willing and do agree, and every of them is willing and doth agree for himself, his heirs, executors, and administrators, by these presents that the said sums shall be levied, recovered, and received of and from them and every of them, and of and from all and singular the manors, messuages, lands, tenements, and hereditaments, goods and chattels, of them and every of them, wheresoever the same shall be found. Witness our sovereign lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and so forth, at Westminster, the day of , 186 .

] has approved of

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Whereas, in the matter of, &c. [*take title from order to wind up*] the Master of the Rolls [*or, Vice-Chancellor*] has, by an order dated the day of , 186 , appointed the said R. P. H. official liquidator of the said company, and has thereby directed him to give security, to be approved of by the said judge [*or, in case the security precedes the order appointing*, has approved of the said R. P. H. as a proper person to be appointed official liquidator of the said company, upon his giving security]. And whereas the said judge has approved of the said W. B. and T. P. to be sureties for the said R. P. H. in the amounts set opposite to their respective names in the schedule hereto, and has also approved of the above-written recognizance, with the under-written condition, as a proper security to be entered into by the said R. P. H., W. B., and T. P., pursuant to the said order and [*or, pursuant to*] the general order of the said court in that behalf; and in testimony of such approbation the chief clerk of the said judge hath signed an allowance in the margin hereof. Now the condition of the above-written recognizance is such, that if the said R. P. H., his executors, or administrators, or any of them, do and shall duly account for what the said R. P. H. shall receive, or become liable to pay, as official liquidator of the said company at such periods and in such manner as the said judge shall appoint, and pay the same as the said judge hath [*by the said order*] directed, or shall hereafter direct, then the above recognizance to be void, otherwise to remain in full force and virtue.

THE SCHEDULE ABOVE REFERRED TO.

R. P. H.	_____	. Thousand pounds.
W. B.	_____	. Thousand pounds.
T. P.	_____	. Thousand pounds.

Taken and acknowledged by the above-named R. P. H., &c. &c.

No. 11. *Affidavit of sureties.* [Rule 10.]

In Chancery.

In the matter, &c.,

We, W. B., of &c., and T. P., of &c., severally make oath, and say as follows:—

1. I, the said W. B., for myself, say that I am worth the sum of £ of lawful money of Great Britain, over and above what is sufficient for the payment of all my just debts and liabilities.

2. And I, the said T. P., for myself, say that I am worth the sum of £ , of &c. [*as above*].

Sworn, &c.

No. 12. *Sanction of appointment of solicitor to official liquidator, and appointment.* [25 & 26 Vict. c. 89, s. 97.]

In the matter, &c.

The Master of the Rolls [*or, Vice-Chancellor*] sanctions the official liquidator appointing a solicitor to assist him in the performance of his duties.

G. H.,
Chief Clerk.

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R. P. H., Official Liquidator.

liquidator. [25 & 26 Vict. c. 89, ss. 100, 101.]

[*or*, Vice-Chancellor

Upon the application of, &c., and on reading, &c., it is ordered that A. B., of &c., do, within four days after service hereof, pay to [or, deliver, convey, surrender, or transfer to or into the hands of] R. P. H., the official liquidator of the said company, at the office of the said R. P. H., situate at &c., the sum of £ , being the amount of debt appearing to be due from the said A. B. on his account with the said company [or, any sum or balance, books, papers, estate, or effects], [or, *specifically describe the property*] now being in the hands of the said A. B., and to which the said company is *primâ facie* entitled [or, *otherwise, as the case may be*].

[Rules 11, 32, 36—44.]

[or, Vice-Chancellor

Gentlemen,

An order, dated the day of , 186 , having been made in relation to the above matter by the Master of the Rolls [*or*, the Vice-Chancellor] for winding up the above-named company by the Court of Chancery, under the provisions of the said act, and R. P. H., of , having by order dated the day of , 186 , been appointed the official liquidator of the said company, you are requested to open an account, to be entitled "The Account of the Official Liquidator of the Company," in your books, pursuant to the said act.

All cheques drawn upon such account must be signed by the official liquidator, whose signature is attached hereto, and countersigned by one of the chief clerks of the said judge, whose signatures are also attached hereto.

I am, Gentlemen,

Your most obedient Servant,

G. H.,

Chief Clerk.

Signatures.

R. P. H., Official Liquidator.

G. W. { Chief Clerks of the Master of the
G. H. { Rolls [*or*, Vice-Chancellor
].

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No. 15. *Advertisement of appointment of official liquidator.*

[Rule 14.]

In the matter, &c.

The Master of the Rolls [*or*, the Vice-Chancellor] has, by an order dated the day of , 186 , appointed R. P. H., of , to be official liquidator of the above-named company.

Dated this day of , 186 .

G. H.,
Chief Clerk.

No. 16. *Advertisement for creditors.* [Rule 20.]

In the matter, &c.

The creditors of the above-named company are required, on or before the day of 186 , to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors, if any, to R. P. H., of , the official liquidator of the said company, and if so required by notice in writing from the said official liquidator, are by their solicitors to come in and prove their said debts or claims, at the chambers of the Master of the Rolls [*or*, the Vice-Chancellor], in the Rolls Yard, Chancery Lane, [*or*, at No. , Lincoln's Inn], in the county of Middlesex, at such time as shall be specified in such notice, or in default thereof they will be excluded from the benefit of any distribution made before such debts are proved.

 day, the day of , 186 , at o'clock in the noon, at the said chambers, is appointed for hearing and adjudicating upon the debts and claims.

Dated this day of , 186 .

G. H.,
Chief Clerk.

No. 17. *Affidavit of official liquidator as to debts and claims.*

[Rule 22.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows:—

1. I have in the paper writing now produced and shown to me, and marked with the letter A, set forth a list of all the debts and claims the particulars of which have been sent in to me by persons making claims upon, or claiming to be creditors of the said company, pursuant to the advertisement issued in that behalf, dated the day of , 186 ; and the names and addresses of the persons by whom such claims are made.

2. I have investigated the said debts and claims, and examined the same with the books and documents of the said company, in order to ascertain, so far as I am able, which of such debts and claims are justly due from the said company: and I have, in the first part of the said list, set forth such of the said debts and claims, or parts thereof, as, in my opinion, are justly due from the said company, and proper to be allowed without further evidence; and I have, in the sixth column of the said first part of the said list, set forth the amounts proper to be allowed in respect of such debts and claims; and I believe that such amounts respec-

tively are justly due and proper to be allowed; and I have, in the seventh column of the said first part of the said list stated my reasons for such belief.

3. I have, in the second part of the said list, set forth such of the said debts and claims as in my opinion ought to be proved by the respective creditors.

Sworn, &c.

No. 18. *Exhibit referred to in affidavit No. 17.*

A.

In the matter, &c.

List of debts and claims of which the particulars have been sent in to the official liquidator.

This paper writing, marked A, was produced and shown to R. P. H., and is the same as is referred to in his affidavit, sworn before me this day of

, 186 .

W. B., &c.

First part.—Debts and claims proper to be allowed without further evidence.

Serial No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt or Claim.	Amount Claimed.	Amount proper to be allowed.	Reasons for belief that amounts are proper to be allowed.
				£ s. d.	£ s. d.	

Second part.—Debts and claims which ought to be proved by the creditors.

Serial No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt or Claim.	Amount Claimed.
				£ s. d.

No. 19. *Notice to creditor of allowance of debt.* [Rule 23.]

In the matter, &c.

[Place and date.]

Sir,

The debt claimed by you in this matter has been allowed by the judge at the sum of £ . [If part only allowed add, If you claim to have a larger sum allowed, you are hereby required to come in and prove the further amount claimed, &c., as in next form.]

I am, &c.,

To Mr. P. R.

R. P. H., Official Liquidator.

No. 20. *Notice to creditors to come in and prove their debts.*

[Rule 24.]

In the matter, &c.

You are hereby required to come in and prove the debt claimed by you against the above-named company, by filing your affidavit, and giving

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notice thereof to me, on or before the day of next; and you are to attend by your solicitor at the chambers of the Master of the Rolls in the Rolls Yard, Chancery Lane [*or, of the Vice-Chancellor* , at No. , Lincoln's Inn], in the county of Middlesex, on the day of , 186 , at o'clock in the noon, being the time appointed for hearing and adjudicating upon the claim.

Dated this day of , 186 .

R. P. H., Official Liquidator.

To Mr. S. T.

No. 21. *Affidavit of creditor in proof of debt.* [Rule 24.]

In Chancery.

In the matter, &c.

I, S. T., of &c., make oath, and say as follows:—

1. The above-named company was, on the day of , 186 , the date of the order for winding up the same, and still is justly and truly indebted to me in the sum of £ for, &c. [*Describe shortly the nature of the debt, and exhibit any security for it; and in the case of a trade debt exhibit a bill of parcels, and verify the reasonableness of the charges, as in proving a debt in a suit.*]

2. I have not, nor hath nor have any person or persons by my order, or to my knowledge or belief, for my used received the said sum of £ or any part thereof, or any security or satisfaction for the same or any part thereof, [*if any security add*], except the said [*describe the security*], hereinbefore mentioned or referred to.

Sworn, &c.

No. 22. *Certificate of chief clerk as to debts and claims.*
[Rule 28.]

In the matter, &c.

In pursuance of the directions given to me by the Master of the Rolls [*or, Vice-Chancellor*], I hereby certify that the result of the adjudication upon debts and claims against the above-named company, brought in pursuant to the advertisement issued in that behalf, dated the day of 186 , so far as such adjudication has up to the date of this certificate been proceeded with, is as follows:—

The debts and claims which have been allowed are set forth in the first schedule hereto, and, with the interest thereon and costs mentioned in the said schedule, are due to the persons therein named, and amount altogether to £ .

I have in the first part of the said schedule set forth such of the said debts and claims as carry interest, and the interest thereon has been computed after the rate they respectively carry down to the date of this certificate.

I have in the second part of the said schedule set forth such of the said debts and claims as do not carry interest, and the interest thereon has been computed at the rate of 4*l.* per cent. per annum, from the day of , 186 , being the date of the said order to wind up the company, down to the date of this certificate.

The claims set forth in the second schedule hereto have been brought in by the persons therein named, and have been disallowed.

The evidence produced, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

First part.—Debts and claims which carry interest.

No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt.	Total due.
				£ s. d.
1.	J. L.	29 Street, London, Stationer.	On Bill of Exchange, dated, &c.	
		Principal	£	
		Interest at £ per cent. per annum, (less Property Tax) from 186 to the date of this Certificate	£	
		Costs of Proof	£	
			Total first Part . £	

Second part.—Debts and claims which do not carry interest.

No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt.	Interest on Principal (less Property Tax).	Total due.
				£ s. d.	£ s. d.
40.	W. P.	15 Street, London.			
		Coal Merchant.	Goods sold		
		Principal	£50 0 0	2 0 0	54 0 0
		Costs of Proof	2 0 0		
			Totals £		
			Add Total first Part. £		
			Total first and second Parts. £		

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THE SECOND SCHEDULE ABOVE REFERRED TO.

No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Claim.	Amount Claimed.
				£ s. d.

Dated this day of , 186 .
G. H., Chief Clerk.

Approved the }
day of , 186 . }

No. 23. *Notice to creditors to attend to receive debt.* [Rule 28.]

In the matter, &c.

Sir,

Upon application at my office, No. Street, Middlesex, on
or after the instant, between the hours of ten and four o'clock, you
may receive a cheque for the amount of your debt, allowed in this matter
as under :—

Principal	£
Interest	£
Costs of proof	£
Total	£

If you cannot attend personally, the cheque will be delivered to your
order, upon your filling up and signing the subjoined form.
The bills or securities (if any) held by you must be produced at the time
of such application.

Dated this day of 186 .
I am, &c.,
R. P. H., Official Liquidator

To Mr. S. T.

[Form of order.]

Sir,

Please to deliver to W. R. the cheque for £ referred to in
the above letter as payable to me.

S. T., Creditor.

To Mr. R. P. H., Official Liquidator }
of the company. }

No. 24. *Affidavit in support of list of contributories.*
[Rule 29.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company,
make oath, and say, as follows :—

1. The paper writing now produced and shown to me, and marked with the letter A, contains a list of the contributories of the said company, made out by me from the books and papers of the said company, together with their respective addresses, and the number of shares [*or*, extent of interest] to be attributed to each; and such list is, to the best of my knowledge, information and belief, a true and accurate list of the contributories of the said company, so far as I have been able to make out and ascertain the same.

2. I have in the first part of the said list marked A, distinguished the persons who are contributories in their own right.

3. I have, in the second part of the said list marked A, distinguished the persons who are contributories as being representatives of, or being liable to the debts of others.

Sworn, &c.

No. 25. *List of contributories referred to in form No. 24.*

A.

In the matter, &c.

This list of contributories marked A, was produced and shown to R. P. H., and is the same list of contributories as is referred to in his affidavit, sworn before me this day of 186 .

W. B., &c.

First part.—Contributories in their own right.

Serial No.	Name.	Address.	Description.	In what character included.	Number of shares [<i>or</i> , extent of interest].

Second part.—Contributories as being representatives of, or liable to the debts of others.

Serial No.	Name.	Address.	Description.	In what character included.	Number of shares [<i>or</i> , extent of interest].

No. 26. *Notice to contributories of appointment to settle list of contributories.*
[Rule 30.]

In the matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] has appointed the day of 186 , at of the clock in the noon,

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at his chambers, in the Rolls Yard, Chancery Lane [*or*, at No. Lincoln's Inn], in the county of Middlesex, to settle the list of the contributories of the above-named company, made out and left at the chambers of the said judge by the official liquidator of the said company, and you are included in such list in the character, and for the number of shares [*or*, extent of interest] stated below; and if no sufficient cause is shown by you to the contrary at the time and place aforesaid, the list will be settled by the said judge, including you therein.

Dated this day of 186 .

R. H. P., Official Liquidator.

To Mr. A. B. [and to }
Mr. C. D., his solicitor]. }

No. on List.	Name.	Address.	Description.	In what character included.	Number of shares [<i>or</i> , extent of interest].

No. 27. *Affidavit of service of notice.* [Rule 30.]

In Chancery.

In the matter, &c.

I, W. S., of &c., clerk to Messrs. C. and D., of &c., the solicitors of the official liquidator of the above-named company, make oath, and say as follows:—

1. The first six columns of the schedule now produced and shown to me and marked with the letter A, contain a true copy of the list of contributories of the said company, made out and left at the chambers of the Master of the Rolls [*or*, Vice-Chancellor], by the said official liquidator, on the day of 186 , and now on the file of proceedings of the said company, as I know from having, on the day of 186 , examined and compared the said schedule with the said list; and I have, in the seventh column of the said schedule marked A, set forth the names and addresses of the solicitors who have entered appearances for any of the contributories named in the list.

2. I did, on the day of 186 , in the manner hereinafter mentioned, serve a true copy of the notice now produced and shown to me, and marked B, upon each of the respective persons whose names, addresses, and descriptions appear in the second, third, and fourth columns of the said schedule marked A, except that in the tabular form at the foot of such copies respectively I inserted the number on list, name, address, description, in what character included, and number of shares [*or*, extent of interest] of the person on whom such copy of the said notice was served, in the same words and figures as the same particulars are set forth in the said schedule marked A.

3. I served the said respective copies of the said notice, by putting such

copies respectively, duly addressed to such persons respectively or their solicitors, according to their respective names and addresses appearing in the said schedule marked A, and with the proper postage-stamps affixed thereto as prepaid letters, into the post-office receiving-house, No.

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in street, in the county of , between the hours of
and of the clock in the noon of the said day
of .

Sworn, &c.

No. 28. *The schedule referred to in form No. 27.*

A.

In the matter, &c.

This schedule marked A was produced and shown to W. S., and is the same schedule as is referred to in his affidavit, sworn before me, this day of 186 .

W. B., &c.

1.	2.	3.	4.	5.	6.	7.
Number on List.	Name.	Address.	Description.	In what character included.	Number of shares [or, extent of interest].	Names and addresses of solicitors who have entered appearances, and been served with a copy of the notice referred to in the affidavit of W. S., to which this schedule is an exhibit.

No. 29. *Supplemental list of contributories, and affidavit in support.*

[Rule 29.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company,
make oath, and say as follows:—

1. Since leaving at the chambers of the judge the list of the contributories in this matter, on the day of 186 , it has come to my knowledge that the several persons whose names are set forth in the supplemental list of contributories now produced and shown to me, and marked with the letter B, are, or have been holders of shares in [or, members of] the said company, and to the best of my judgment, information, and belief, such persons are contributories of the said company.

2. The said supplemental list marked B, contains the names of such

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persons, together with their respective addresses, and the number of shares [*or*, extent of interest] to be attributed to each; and such list is, to the best of my knowledge, information, and belief, true and accurate.

3. I have, in the first part of the said list marked B, distinguished such of the said persons as are contributories in their own right.

4. I have, in the second part of the said list marked B, distinguished such of the said persons as are contributories as being representatives of, or being liable to the debts of others.

Sworn, &c.

No. 30. *Supplemental list of contributories referred to in form No. 29.*

B.

In the matter, &c.

This supplemental list of contributories marked B, was produced and shown to R. P. H., and is the same supplemental list of contributories as referred to in his affidavit, sworn before me this day of 186 .

W. B., &c.

Note.—The supplemental list is to be made out in the same form as the original list, Form No. 25.

No. 31. *Certificate of chief clerk of settlement of the list of contributories.*

[Rule 31.]

In the matter, &c.

In pursuance of the directions given to me by the Master of the Rolls [*or*, Vice-Chancellor], I hereby certify that the result of the settlement of the list of contributories of the above-named company, made out and left at the chambers of the said judge by the official liquidator of the said company on the day of 186 , pursuant to the above statute and the general order of this court in that behalf, so far as the said list has been settled up to the date of this certificate, is as follows :—

1. The several persons whose names are set forth in the second column of the first schedule hereto, have been included in the said list of contributories as contributories of the said company in respect of the number of shares [*or*, extent of interest] set opposite the names of such contributories respectively in the said schedule.

I have, in the first part of the said schedule, distinguished such of the said several persons included in the said list, as are contributories in their own right.

I have, in the second part of the said schedule, distinguished such of the said several persons included in the said list as are contributories, as being representatives of, or being liable to the debts of others.

2. The several persons whose names are set forth in the second column of the second schedule hereto have been excluded from the said list of contributories.

3. I have, in the seventh column of the said first and second schedules, set forth opposite the name of each of the said several persons respectively, the date when such person was included in or excluded from the said list of contributories.

The evidence produced, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

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First part.—Contributories in their own right.

Serial No. in list.	Name.	Address.	Description.	In what character included.	Number of shares [or, extent of interest].	Date when included in the list.

Second part.—Contributories as being representatives of, or liable to the debts of others.

Serial No. in list.	Name.	Address.	Description.	In what character included.	Number of shares [or, extent of interest].	Date when included in the list.

THE SECOND SCHEDULE ABOVE REFERRED TO.

Serial No. in list.	Name.	Address.	Description.	In what character proposed to be included.	Number of shares [or, extent of interest].	Date when excluded from the list.

Dated this day of 186 ,

G. H., Chief Clerk.

Approved the }
day of 186 , }

APPENDIX VI.No. 32. *Order on application to vary list.* [Rule 29.]

Master of the Rolls [or,
 Vice-Chancellor] } day the day of 186 .
 at chambers. } In the matter, &c.

Upon the application of W. N. to review the list of contributories of the said company, in respect of the inclusion of the said W. N. therein, and that his name may be excluded therefrom, and upon hearing counsel, &c., and upon reading, &c., It is ordered, That the name of the said W. N. be excluded from the said list of contributories [or, the judge doth not think fit to make any order on the said application, except that the said W. N. do pay to R. P. H., the official liquidator of the said company, his costs of this application, to be taxed by the taxing master in case the parties differ].

No. 33. *Affidavit of official liquidator in support of proposal for call.*
 [Rule 33.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows :—

1. I have, in the schedule now produced and shown to me, and marked with the letter A, set forth a statement, showing the amount due in respect of the debts allowed against the said company, and the estimated amount of the costs, charges, and expenses of and incidental to the winding up of the affairs thereof, and which several amounts form in the aggregate the sum of £ or thereabouts.

2. I have also in the said schedule set forth a statement of the assets in hand belonging to the said company, amounting to the sum of £ and no more. There are no other assets belonging to the said company, except the amounts due from certain of the contributories of the said company, and, to the best of my information and belief, it will be impossible to realise in respect of the said amounts more than the sum of £ or thereabouts.

3. It appears by the chief clerk's certificate, dated the day of 186 , that persons have been settled on the list of contributories of the said company, in respect of the total number of shares.

4. For the purpose of satisfying the several debts and liabilities of the said company, and of paying the costs, charges, and expenses of and incidental to the winding up the affairs thereof, I believe the sum of £ will be required, in addition to the amount of the assets of the said company mentioned in the said schedule A, and the said sum of £ .

5. In order to provide the said sum of £ , it is necessary to make a call upon the several persons who have been settled on the list of contributories as before mentioned, and having regard to the probability that some of such contributories will partly or wholly fail to pay the amount of such call, I believe that for the purpose of realising the amount required as before mentioned, it is necessary that a call of £ per share should be made.

Sworn, &c.

No. 34. *Summons for intended call.* [Rule 33.]

In the matter, &c.

Let all parties concerned attend at my chambers in the Rolls Yard, Chancery Lane [*or*, at No , Lincoln's Inn], in the county of Middlesex, on day, the day of 186 , at of the clock in the noon, on the hearing of an application on the part of the official liquidator of the above-named company, that a call to the amount of £ per share may be made on all the contributories [*or, if upon any particular class, specify the same*] of the said company.

John Romilly, Master of the Rolls.

or

X. Y., Vice-Chancellor.

This summons was taken out by A. & B., of , in the county of , solicitors for the said official liquidator.

To Mr. A. B., of &c., a contributory of the said }
company proposed to be included in the said call. }

No. 35. *Advertisement of intended call.* [Rule 33.]

In the matter, &c.

By direction of the Master of the Rolls [*or*, Vice-Chancellor], notice is hereby given that the said judge has appointed the day of , 186 , at o'clock in the noon, at his chambers in the Rolls Yard, &c., to make a call on all the contributories of the said company [*or, as the case may be*], and that the official liquidator of the said company proposes that such call shall be for £ per share. All persons interested are entitled to attend at such day, hour, and place, to offer objections to such call.

Dated this day of 186 .

G. H.,

Chief Clerk.

No. 36. *General order for a call.* [Rule 34.]

Master of the Rolls [*or*, the day of
Vice-Chancellor 186 .
] at Chambers. } In the matter, &c.

Upon the application of the official liquidator of the above-named company, and upon reading two orders, dated the day of 186 , and the day of 186 , the chief clerk's certificate, dated the day of 186 , an affidavit of the said official liquidator, filed 186 , and the exhibit marked A, therein referred to, and an affidavit of filed 186 , It is ordered, That a call of pounds per share be made on all the contributories of the said company [*or, as the case may be*]. And it is ordered, that each such contributory do on or before the day of 186 , pay into the Bank of England, to the account of the official liquidator of the company, the amount which will be due from him or her in respect of such call.

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No. 37. *Notice to be served with the general order for a call.*

[Rule 34.]

In the matter, &c.

The amount due from you, A. B., in respect of the call made by the above [*or within*] order, is the sum of £ , which sum is to be paid by you into the Bank of England, to the account mentioned in the said order. You can pay the same in person, or through a banker or other agent: but this notice and copy order must be produced at the bank upon such payment, and the cashier of the bank will, upon receiving the same, deliver to you a certificate of the payment in, numbered , signed by the said cashier. In order to prevent proceedings being taken against you for non-payment, you must, immediately upon such payment in, cause written notice of the payment and of the date thereof to be given to me as the official liquidator of the said company, at my office, No. Street, in the county of Middlesex.

Dated this day of 186 .

R. P. H., Official Liquidator.

To Mr. A. B.

No. 38. *Affidavit in support of application for order for payment of call due from contributories.* [Rule 35.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath and say as follows:—

1. None of the contributories of the said company whose names are set forth in the schedule hereunto annexed, marked A, have paid, or caused to be paid, the respective sums set opposite their respective names in the said schedule, and which sums are the respective amounts now due from them respectively in respect of the call of £ per share, in pursuance of the order of the judge in that behalf, dated the day of 186 .

2. The respective amounts or sums set opposite the names of such contributories respectively in such schedule, are the true amounts due and owing by such contributories respectively in respect of the said call.

Sworn, &c.

A.

THE SCHEDULE ABOVE REFERRED TO.

No. on List.	Name.	Address.	Description.	In what character included.	Amount due.
					£ s. d.

Note.—In addition to the above affidavit, an affidavit of the service of the order and notice (Nos. 36 and 37) will be required.

Upon the application of the official liquidator of the above-named company, and upon reading the order, dated the day of , 186 , an affidavit of filed the day of 186 , and an affidavit of the said official liquidator, filed the day of 186 . It is ordered that C. D., of &c. [*or* E. F., of &c., the legal personal representative of L. M., late of &c., deceased], one of the contributories of the said company [*or if against several contributories*, the several persons named in the second column of the schedule to this order being respectively contributories of the said company] do on or before the day of 186 , or within four days after service of this order, pay into the Bank of England, to the account of the official liquidator of the company, [*or* to A. B., the official liquidator of the said company, at his office, No. Street, in the county of Middlesex], the sum of £ [*if against a legal personal representative add*, out of the assets of the said L. M., deceased, in his hands as such legal personal representative as aforesaid to be administered in a due course of administration, if the said E. F. has in his hands so much to be administered: *or if against several contributories*, the several sums of money set opposite to their respective names in the sixth column of the said schedule hereto], such sum [*or*, sums] being the amount [*or*, amounts] due from the said C. D. [*or*, L. M.] [*or*, the said several persons respectively] in respect of the call of £ per share made by the said order dated the day of 186 .

THE SCHEDULE REFERRED TO IN THE FOREGOING ORDER.

No. on List.	Name.	Address.	Description.	In what character included.	Amount due.
					£ s. d.

Note.—The copy for service of the above order must be endorsed, as required by the 23rd Consol. Order, rule 10 (a).

No. 40. *Notice to be endorsed on, or served with, every order directing payment of money into the Bank of England.* [Rule 39.]

You can make the payment directed by the within [or, above] order at the Bank of England in person, &c. [as in the form No. 37.]

R. P. H., Official Liquidator.

To Mr.

(a) The endorsement is to the effect that if the order is not obeyed, the person in default will be liable to be arrested and have his estate sequestered.

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No. 41. *Certificate of payment of money into the Bank of England.*
[Rule 39.]

In the matter, &c.

No.

day of 186 .

I hereby certify that C. D., of &c., has this day paid into the Bank of England the sum of , to be placed to the credit of the official liquidator of the company, pursuant to an order dated the day of , 186 .

For the governor and company of the Bank of England,

H. M.,

Cashier.

£ .

No. 42. *Affidavit of service of order for payment of call.*
[Rule 35.]

In Chancery.

In the matter, &c.

I, J. B., of &c., make oath, and say as follows:—

1. I did, on the day of , 186 , personally serve G. F. of , in the county of , &c., with an order made in this matter by his honor the Master of the Rolls [*or*, Vice-Chancellor], dated the day of , 186 , whereby it was ordered [*set out the order in the past tense*] by delivering to and leaving with the said G. F. at , in the county of , a true copy of the said order, and at the same time producing and showing unto him, the said G. F., the said original order duly entered.

2. There was endorsed on the said copy, when so served, the following words, that is to say, “If you, the within-named G. F., neglect to obey this order by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery, or by the serjeant-at-arms attending the same court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order.”

Sworn, &c.

No. 43. *Affidavit of non-payment of money by order directed to be paid into the Bank of England.* [Rule 40.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows:—

1. G. F., the person named in an order made in this matter by his honor the Master of the Rolls [*or*, Vice-Chancellor], dated the day of , 186 , has not paid into the Bank of England, to the account of the official liquidator of the company, the whole or any part of the sum of £ as by the said order directed.

[Or, in case of several parties.]

1. None of the several persons whose names and addresses are set forth in the schedule hereunder written, and who have respectively been duly served with orders made in this matter by his honor the Master of the Rolls [or, Vice-Chancellor], of the respective dates set opposite to their respective names in the said schedule, have paid into the Bank of England to the account of the official liquidator of the company, the whole or any part of the several sums of money set opposite to their respective names in the said schedule hereunder written, as by the said orders respectively directed.

2. I am enabled to depose to such non-payment, by reason of my having this day ascertained by inquiry at the said bank, that such payment [or, payments] has [or, have] not been made, and seen the certificate of payment in, numbered [or, several certificates of payments in, the numbers whereof respectively are set forth in the sixth column of the said schedule, opposite the names of the said respective persons, being certificates] furnished by me to the cashier of the said bank for delivery to the said G. F. [or, several persons respectively] upon such payment [or, payments] being made, still in the hands of the cashier of the said bank. No notice [or, notices] of such payment [or, payments] having been made has [or, have] been given to me by the said G. F. [or, several persons respectively.]

Sworn, &c.

THE SCHEDULE ABOVE REFERRED TO.

Name.	Address.	Description.	Amount.	Date of balance order.	Number of certificate.
			£ s. d.		

No. 44. *Request to invest cash in Government stock or Exchequer bills.*
[Rule 43.]

In the matter, &c.,

To the Governor and Company of the Bank of England.

Gentlemen,

It appearing that the sum of £ cash is standing to the credit of the account of the official liquidator of the above-named company, you are hereby requested to invest the sum of £, part thereof, in the purchase of Bank £3 per cent. annuities (or, Reduced £3 per cent. annuities, or, New £3 per cent. annuities, or, New £2 10s. per cent. annuities] in the name of R. P. H., of &c., the official liquidator of the said company [or, in the purchase of Exchequer bills, and to deposit such Exchequer bills in the Bank of England, in the name and on behalf of the said official liquidator]. The said annuities [or, Exchequer bills] are not to be sold, transferred, or otherwise dealt with, except upon a direction for

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that purpose signed by the official liquidator of the said company, and countersigned by the chief clerk of the Master of the Rolls [*or*, Vice-Chancellor], or under an order to be made by the said judge.

Dated this day of , 186 .

I am, gentlemen,

Your most obedient servant,

R. P. H., Official Liquidator.

Countersigned,

G. H., Chief Clerk of the Master of the Rolls

[*or*, Vice-Chancellor].

No. 45. *Notice or advertisement of meeting of creditors or contributories.*

[Rules 45, 46.]

In the matter, &c.

Notice is hereby given that the Master of the Rolls [*or*, Vice-Chancellor] has directed a meeting of the creditors [*or*, contributories] of the above-named company to be summoned pursuant to the above statute, for the purpose of ascertaining their wishes as to [*state the object for which meeting called, unless notice is by advertisement, in which case say, certain matters relating to the winding up of the said company*], and that such meeting will be held on day, the day of , 186 , at o'clock in the noon, at in the county of , at which time and place all the creditors [*or*, contributories] of the said company are requested to attend. [The said judge has appointed H. T., of &c. to act as chairman of such meeting.]

Dated this day of 186 .

R. P. H., Official Liquidator.

No. 46. *Appointment of proxy to vote at meeting of creditors or contributories.* [Rule 46.]

In the matter, &c.

I, W. S., of in the county of being a creditor [*or*, contributory] of the above-named company, hereby appoint of as my proxy to vote for me, and on my behalf, at the meeting of the creditors [*or*, contributories] of the said company, summoned by direction of the Master of the Rolls [*or*, Vice-Chancellor], to be held on the day of and at any adjournment thereof.

As witness my hand, this day of 186 .

W. S.

Signed by the said W. S.
in the presence of

J. M., of &c.

No. 47. *Memorandum of appointment of a person to act as chairman at meeting of creditors or contributories.* [Rule 47.]

In the matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] has appointed Mr. H. T., of &c., one of the creditors [*or*, contributories] of the above-named company, to act as chairman of a meeting of the creditors [*or*, contributories] of the said company, summoned by direction of the said judge

pursuant to the above statute, to be held on day, the day
of , 186 , at o'clock in the noon, at , in
the county of , and to report the result of such meeting to the
said judge.

The said meeting is summoned for the purpose of ascertaining the
wishes of the creditors [*or, contributories*] of the said company as to
[*state the object for which meeting called*]; and at such meeting the votes
of the creditors [*or, contributories*] may be given either personally or by
proxy.

Dated this day of 186 .

G. H., Chief Clerk.

No. 48. *Chairman's report of result of meeting of creditors or contributories.*
[Rules 45, 46, 47.]

In the matter, &c.

I, H. T., the person appointed by the Master of the Rolls [*or, Vice-Chancellor*] to act as chairman of a meeting of the creditors [*or, contributories*] of the above-named company, summoned by advertise-
ment [*or, notice*] dated the day of 186 , and held on
the day of 186 , at in the county of ,
do hereby report to the said judge the result of such meeting as fol-
lows:—

The said meeting was attended either personally or by proxy, by
creditors to whom debts against the said company have been allowed,
amounting in the whole to the value of £ [*or, by contribu-*
tories, holding in the whole shares in the said company, and
entitled respectively, by the regulations of the company, to the number
of votes hereinafter mentioned].

The question submitted to the meeting was, whether the creditors
[*or, contributories*] of the said company approved of the proposal of the
official liquidator of the said company, that, &c. [*as the case may be*], and
wished that such proposal should be adopted and carried into effect.

The said meeting was unanimously of opinion that the said proposal
should [*or, should not*] be adopted and carried into effect [*or, The result*
of the voting upon such question was as follows:—]

The undermentioned creditors [*or, contributories*] voted in favour of
the said proposal being adopted and carried into effect:—

Name of creditor [<i>or, contributory</i>].	Address.	Value of debt [<i>or, number of shares</i>].	Number of votes conferred on each contributory by the regulations of the company.

APPENDIX VI. The undermentioned creditors [*or*, contributories] voted against the said proposal being adopted and carried into effect :—

Name of creditor [<i>or</i> , contributory].	Address.	Value of debt [<i>or</i> , number of shares].	Number of votes conferred on each contributory by the regulations of the company.

Dated this day of 186 .
(Signed) H. T., Chairman.

No. 49. *Memorandum of sanction of judge to accepting bill of exchange.*
[Rule 48.]

In the matter, &c.
The Master of the Rolls [*or*, Vice-Chancellor] has sanctioned the acceptance of this bill of exchange by the official liquidator, on behalf of the said company.

G. H., Chief Clerk.

No. 50. *Memorandum of agreement of compromise with a contributory.*
[Rule 49.]

In the matter, &c.
Memorandum of agreement, entered into this day of 186 , between R. P. H., of &c., the official liquidator of the above-named company of the one part, and S. B., of &c., one of the contributories of the said company, of the other part.
Whereas the said S. B. has been settled on the list of contributories of the said company as a contributory in respect of shares in the said company, and whereas by an order made by the Master of the Rolls [*or*, Vice-Chancellor], dated the day of 186 , a call of £ per share was made on all the contributories of the said company, and there is now due from the said S. B. to the said company the sum of £ in respect of the said call. And whereas the said S. B. has proposed to pay to the said official liquidator the sum of £ by way of compromise, and in satisfaction and discharge of the said sum of £ , and of all liability whatsoever as a contributory of the said company. And whereas the said official liquidator, having investigated the affairs of the said S. B., and believing that such compromise will be beneficial to the said company, hath, in exercise of the power for that

purpose given to him by the above statute, agreed to accept the same, subject to the sanction of the said judge, and to the conditions and agreements hereinafter contained. Now it is hereby agreed by and between the said parties hereto :

1st. That the said official liquidator shall, before the day of next, apply to the said judge at chambers to sanction this agreement of compromise.

2nd. That upon this agreement being sanctioned by the said judge, the said S. B. shall, within days next after such sanction, pay to the said official liquidator the said sum of £ , and when thereto required, shall do and execute all such acts and deeds as may be necessary for transferring, or surrendering and releasing, to the said official liquidator on behalf of the said company, or in such manner as the said judge may direct, the said shares held by the said S. B. in the said company, and all claim and demand whatsoever which the said S. B. has, or may have, against the said company in respect of the said shares, or the distribution of the assets of the said company, or otherwise howsoever.

3rd. That the said sum of £ , and the transfer or surrender and release of the said shares and interest of the said S. B., as aforesaid, shall be accepted by the said official liquidator as, and be deemed and taken to give to the said S. B. full and complete discharge from all calls and liabilities, claims and demands whatsoever, which the said company, or the official liquidator thereof, now has or may hereafter have, or be entitled to, against the said S. B., in respect of his being or having been the holder of the said shares, or otherwise, as a contributory of the said company.

4th. That in case this agreement shall not be sanctioned by the said judge it shall cease and determine, and the said official liquidator and the said S. B. shall be remitted to their original rights with respect to each other, as if this agreement had not been entered into.

5th. That in case this agreement shall be sanctioned by the said judge, and the said S. B. shall not in all respects perform the same on his part, the official liquidator shall be at liberty, with the sanction of the said judge, and without notice to the said S. B., to enforce the performance thereof, or, with the like sanction, to give notice to the said S. B. that he abandons this agreement, whereupon the same shall cease and determine, and the said official liquidator shall be entitled to proceed against the said S. B. to enforce payment of the said sum of £ , or so much thereof as shall then remain due and unpaid, as if this agreement had not been entered into.

R. P. H., Official Liquidator.
S. B.

Witness to the signatures }
of the said R. P. H. and S. B., }
C. D. of, &c. }

No. 51. *Memorandum of sanction of judge to agreement of compromise.*

[Rule 49.]

In the matter, &c.

The Master of the Rolls [or, Vice-Chancellor] has sanctioned this agreement of compromise.

G. H.,
Chief Clerk.

APPENDIX VI. No. 52. *Order or memorandum of the sanction of the judge for certain acts to be done by the official liquidator.* [Rule 50.]

The Master of the Rolls [or, Vice-Chancellor at chambers.] } day of 186 .
In the matter, &c.

The Master of the Rolls [or, Vice-Chancellor] doth hereby sanction [or, has sanctioned] the following proceedings being taken [or, acts being done] by the official liquidator of the above-named company, namely [state the proceedings to be taken or acts to be done as,] the bringing [or, instituting] and prosecuting an action at law [or, suit in equity], in the name and on behalf of the said company, against [or, defending an action at law [or, suit in equity] brought [or, instituted] against the said company by] K. M., of &c., to recover a debt or sum of £ alleged to be due from [or, to] the said K. M. to [or, from] the said company, &c.

G. H.,
Chief Clerk.

No. 53. *Appearance book.* [Rule 62.]
In the matter, &c.

Appearance book.

Date when appearance entered.	Party's Name.	Whether creditor or contributory.	If he appears in person, his address for service.	If he appears by a solicitor, his solicitor's name.	Solicitor's address.	Amount of debt [or, number of shares].

No. 54. *Summons for persons to attend at chambers to be examined.*
[25 & 26 Vic. c. 89, s. 115.]

In Chancery.
In the matter, &c.

A. B., &c., and E. F., are hereby severally summoned to attend at the chambers of the Master of the Rolls [or, Vice-Chancellor], in the Rolls Yard, Chancery Lane [or, No. Lincoln's Inn], in the county of Middlesex, on day of 186 , at of the clock in the noon, to be examined on the part of the official liquidator [or, of W. D., of &c.], for the purpose of proceedings directed by the Master of the Rolls [or, the said Vice-Chancellor] to be taken before me in the above matter. [And the said A. B. is hereby required to bring with him and produce, at the time and place aforesaid, a certain indenture [describe documents] and all other books, papers, deeds, writing, and

other documents in his custody or power in anywise relating to the above-named company.]

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Dated this day of 186 .

G. H.,
Chief Clerk.

This summons was taken out by Messrs. C. & D., of in the county of , solicitors for the official liquidator [or, for the said W. D.]

No. 55. *Certificate of the company being completely wound up, and of the official liquidator having passed his final account.*

[Rule 66.]

In the matter, &c.

In pursuance of the directions given to me by the Master of the Rolls [or, Vice-Chancellor], I hereby certify that R. P. H., the official liquidator of the above-named company, has passed his final account as such official liquidator, and that the balance of £ thereby certified to be due to [or, from] the said official liquidator has been paid in the manner directed by the order dated the day of 186 . And that the affairs of the said company have been completely wound up.

The evidence produced, &c.

Dated this day of 186 .

G. H.,
Chief Clerk.

Approved the }
day of 186 . }

No. 56. *Order to dissolve the company.* [Rule 66.]

The Master of the Rolls [or,], the
Vice-Chancellor], day of 186 .
at chambers. In the matter, &c.

Upon the application of the official liquidator of the above-named company, and upon reading an order dated the day of , and the chief clerk's certificate, dated the day of , whereby it appears that the affairs of the said company have been completely wound up, and that the balance of £ , due from [or, to] the official liquidator, has been paid in manner directed by the said order; it is ordered that the said company be dissolved, as from this day of 186 , and that the recognizance dated the day of 186 , entered into by the said official liquidator, together with W. B. and T. P., his sureties, be vacated.

WESTBURY, C.
JOHN ROMILLY, M. R.
RICHD. T. KINDERSLEY, V.-C.
JOHN STUART, V.-C.
W. P. WOOD, V.-C.

of the Commission is hereby certified to the Senate as a true and correct copy of the original report.

Witness my hand and seal at the City of New York, this 1st day of January, 1881.

JOHN W. WALKER, Commissioner.

Attest: JOHN W. WALKER, Commissioner.

And that the above is the true and correct copy of the original report, I hereby certify.

JOHN W. WALKER, Commissioner.

Attest: JOHN W. WALKER, Commissioner.

And that the above is the true and correct copy of the original report, I hereby certify.

JOHN W. WALKER, Commissioner.

Attest: JOHN W. WALKER, Commissioner.

INDEX NO. I.

INDEX TO THE COMPANIES ACT, 1862, AND TO THE CLAUSES OF TABLE A., AND TO THE RULES IN CHANCERY PROMULGATED UNDER THE AUTHORITY OF THE ACT.

N.B.—In this Index the numbers preceded by the letter “s.” refer to the sections of the Companies Act, 1862; those preceded by the letter “A.” refer to the clauses of Table A. in the first Schedule to the Act; and those preceded by the letter “r.” refer to the rules promulgated under the authority of the Act by the Court of Chancery.

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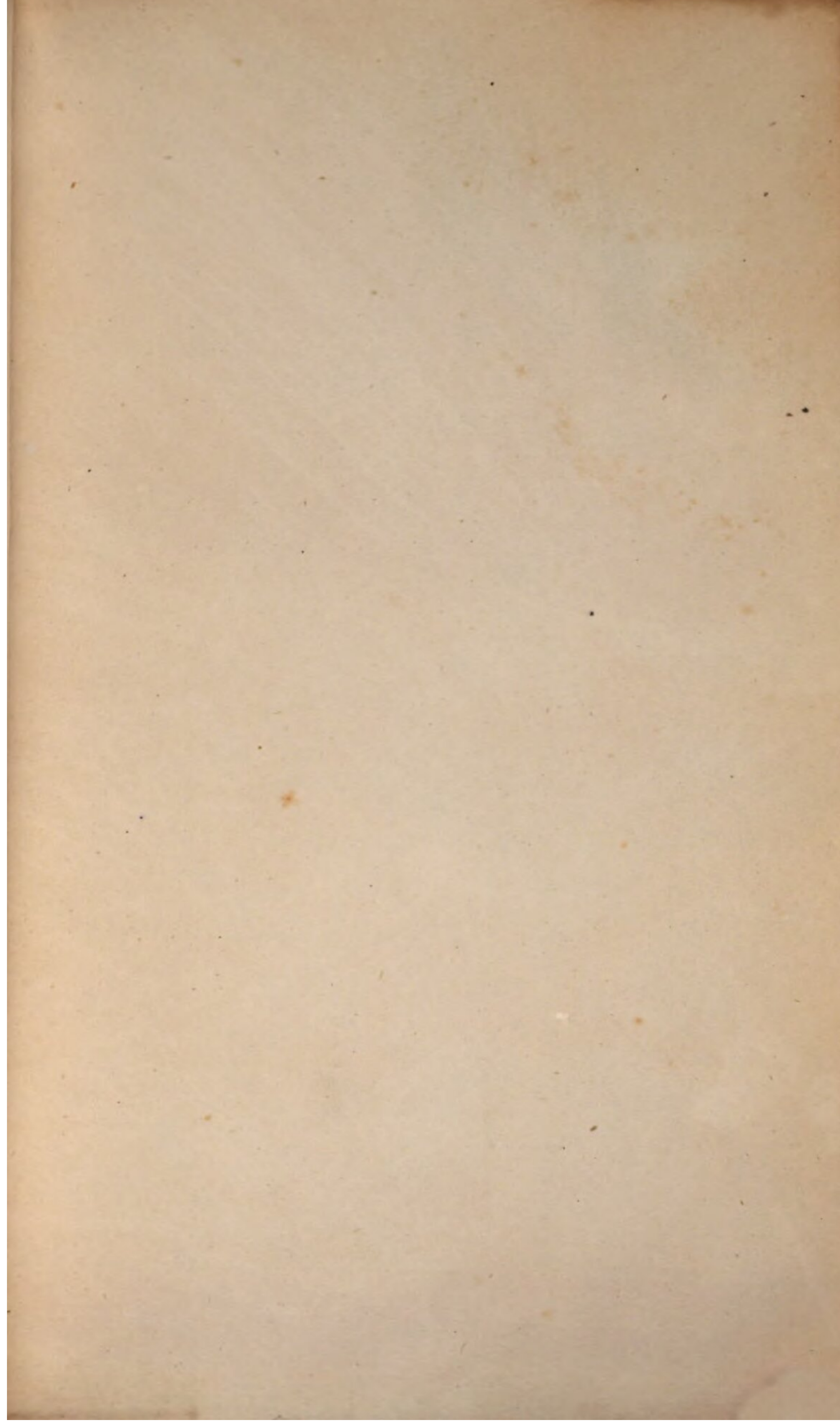
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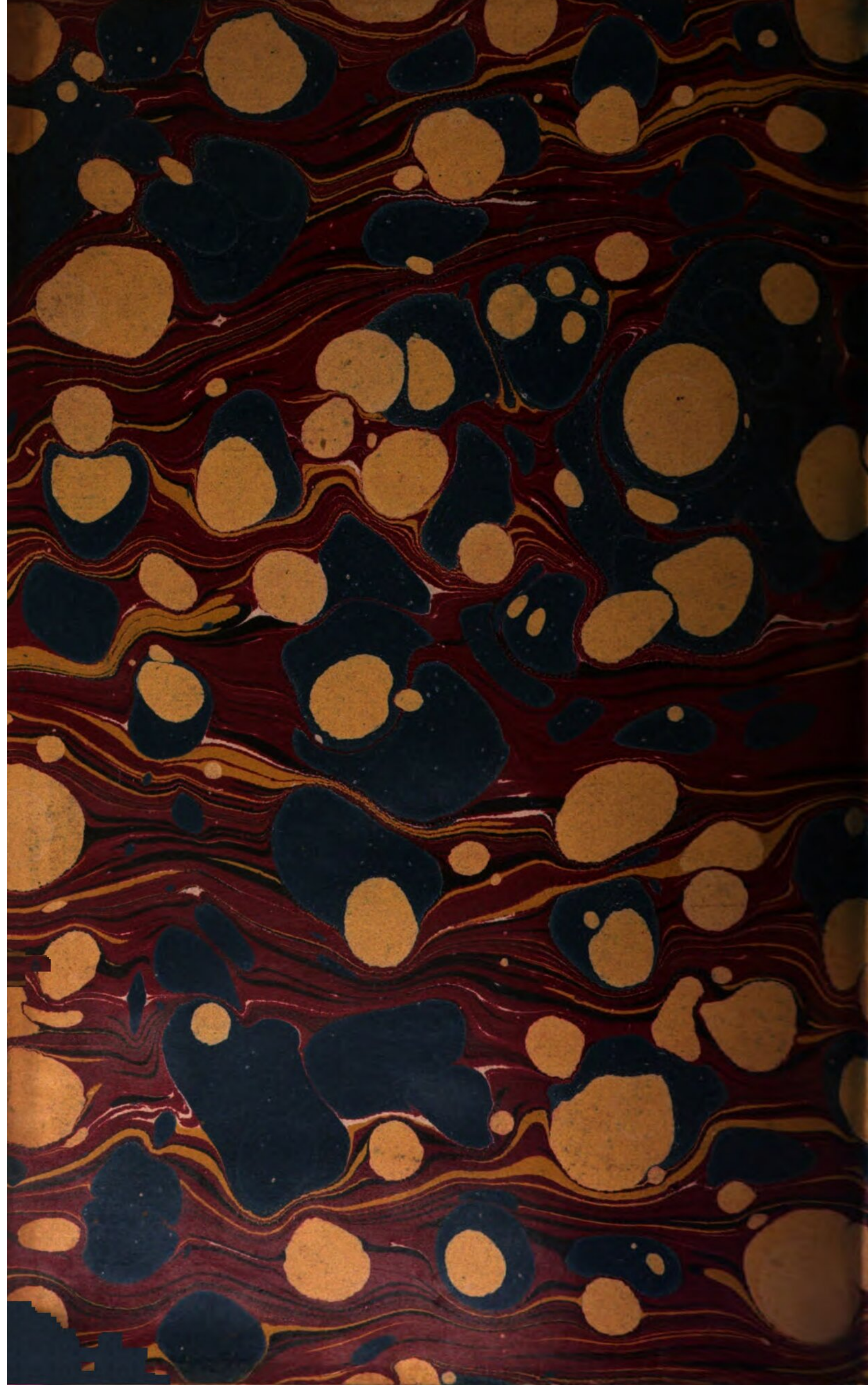
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